The Advocate, Vol. 20, No. 6 (November 1998)

Table of Contents

(Page numbers included for benefit of users of paper edition)

 Go Back to the List of Online Advocate Issues

The Advocate, Vol. 20, No. 6 (November 1998)

The Kentucky Department of Public Advocacy on the Web

DPA Home Page: At http://dpa.state.ky.us/ contains a history of defenders in Kentucky; DPA's mission and information about defender caseloads; the Public Advocacy Commission; the agency's 4 divisions: Trial, Post-Trial, Protection & Advocacy, Law Operations; Kentucky defender funding relative to national defender funding; maps of counties covered by full-time defenders and prosecutors; the agency's core values; and links to defender employment opportunities; the National Legal Aid and Defender Association's home page and other links. Thanks to Randy Wheeler for placing this information on our page!

We hope that you find this service useful. If you have any suggestions or comments, please send them to DPA Webmaster, 100 Fair Oaks Lane, Frankfort, 40601.

DPA Employment Opportunities: Available defender jobs are posted at: http://dpa.state.ky.us/career.htm

The Advocate: *The Advocate* newsletter is now available at http://dpa.state.ky.us/library/advocate starting with the May 1998 issue.

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Return to the Table of Contents

The Advocate, Vol. 20, No. 6 (November 1998)

From the Editor

Juries are the genius of our criminal justice system. Our life and liberty are the most cherished values of our American society. Juries are democracy at its finest. Juries in criminal cases make 2 decisions critical to the life and liberty of people in the community: whether their fellow citizen is guilty or not and, if so, the appropriate sentence. Jurors have the most critical skill necessary for good decision making - common sense. Their experience in the community provides jurors with perspectives, viewpoints, and outlooks necessary for wisdom. Kentucky stands at the forefront in the nation in accessing the wisdom of our citizens for both the guilty/innocence decisions and the punishment decision in criminal trials. Ordinary people, randomly selected to serve in groups of 12 as jurors express the *conscience of the community* in ways no other person or group has the capacity to do. **Rep. Gross Lindsay** of Henderson reflects on why Kentucky should not abandon the use of its citizens for such important work.

Professionalism & Excellence is what each of us wants when served by a professional from doctors and airlines to auto mechanics and plumbers. At the direction of the Public Advocate **Ernie Lewis**, Kentucky defenders have worked long and hard under the leadership of **Alma Hall, Ph.D.**, Georgetown College, to set their sights on public defending

The Advocate

The Advocate provides education and research for persons serving indigent clients in order to improve client representation and insure fair process and reliable results for those whose life or liberty is at risk. The Advocate educates criminal justice professionals and the public on its work, mission and values.

The Advocate is a bi-monthly (January, March, May, July, September, November) publication of the Department of Public Advocacy, an independent agency within the Public Protection and Regulation Cabinet. Opinions expressed in articles are those of the authors and do not necessarily represent the views of DPA. *The Advocate* welcomes correspondence on subjects covered by it. If you have an article our readers will find of interest, type a short outline or general description and send it to the Editor.

that is the hallmark of professionalism and excellence. The report of that effort is carried in this issue.

Jeff Sherr begins this issue as the new associate editor for *The Advocate*'s District Court Column.

Justice J. William Graves and **Judge Bill Cunningham** dialogue on the time taken in capital cases.

Edward C. Monahan
Editor, *The Advocate*

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Return to the Table of Contents

The Advocate, Vol. 20, No. 6 (November 1998)

Judicial Sentencing vs. Jury Sentencing

Representative Gross Lindsay
Henderson, Kentucky

Judicial Sentencing has been touted as a means to achieve sentencing uniformity across the Commonwealth. It is my opinion that judicial sentencing is not a cure to this supposed problem.

We must remember that there had been judicial sentencing in Federal Courts since minds of man runneth not to the contrary until the 1980s when the Federal Courts were required to adopt the guidelines for sentencing. In *United State of America v. Mejia-Orosco,* 867 F.2d 216, 218 (5th Cir. 1989), the Court stated, "an unjustifiable wide range of punishments was meted out to similar offenders convicted of committing similar crimes under like circumstances." The disparity of sentences doled out by Federal Judges has been acknowledged by almost everyone who has a role in the judicial system. The question then, is that bad. Congress presumed a problem and responded to the lack of uniformity in the 80s by creating the United States Sentencing Commission to establish guidelines for Federal Judges. "Senator Edward M. Kennedy described the guidelines as 'a comprehensive and far reaching new approach...[designed to] reduce the unacceptable disparity of punishment that plagues the Court system.' 32 Fed. B. News and J. 60, 65 (1985)." *United States of America v. Mejia-Orosco*,F.2d 216, 218 (5th Cir. 1989). Is the cure as bad as the problem?

The chaos ensuing from efforts to deal with the situation through these guidelines, should serve to caution against abandoning jury sentencing in favor of judicial sentencing. Such a move in the name of achieving the supposed goal of greater uniformity would be contrary to the wisdom of experience. The sentencing guidelines have failed to produce uniformity and have, instead, been fraught with many additional problems. For example, the effort to reconcile the various theories regarding the purpose of criminal punishment has resulted in contradictory compromises. 18 USCS Appx. Ch 1, Part A, No. 3 (Sentencing Guidelines).

The United States Sentencing Guidelines employ a heavily empirical approach. This is not surprising because an effort to draft a comprehensive sentencing plan to encompass all the many different crimes is a formidable enough task without considering all of the *subjective* circumstances that could make one deserving of more or less punishment**.** However, such factors must be considered in order to maintain the proportionality in sentencing.

Experience with judicial sentencing in Federal Courts demonstrates that this is not a potion that will halt disparity in sentencing. We know from a historical comparison of punishments imposed by the Federal Courts that judicial sentencing alone will not achieve uniformity, hence the necessity for the strict guidelines. We further know from looking at the Federal System that guidelines designed to more closely approximate uniformity will fall short and, instead, bring new problems. Thus, if we are seriously going to debate abandoning jury sentencing in this Commonwealth and turning to judicial sentencing, which will require the strict empirical guidelines to even hint at advancing the asserted goal of sentencing uniformity, then we must ask ourselves whether a sentencing procedure which sacrifices proportionality for a set of bureaucratically designed and mechanically imposed equations of limited functionality is consistent with our traditional notions of justice.

Kentucky has previously experimented with phasing out part of the jury's role in sentencing. The General Assembly gave the role of sentencing to the Court in Chapter 4 of the Acts of 1910. However, the Legislature hastened to reestablish sentencing as the role of the jury through Chapter 19 of the Acts of 1914. Alexis de Tocqueville, in his *Democracy in America*Pp.249-250, 1966, stated, "The English adopted [the jury] when they were a semi-barbarian people; they have since become one of the most enlightened nations in the world, and their attachment to the jury system seems to have grown with their enlightenment... They have established it everywhere or have hastened to reestablish it"

It is not surprising that judicial sentencing endured for a mere four years in Kentucky considering the citizens' of this Commonwealth love of individual rights and freedoms, especially considering the attitude of the various localities. Judicial sentencing, in my opinion, would be as impractical and unpopular today as it was eight decades ago. Sentences being imparted by a jury, a body reflecting local views and opinions, is perceived by our citizenry as a safeguard of justice. As the Court in *Cornelison v. Commonwealth*, 84 Ky. 583, 2 S.W**.** 235, 242 (1886), stated, "[A] jury of twelve men, that has, since the existence of *magna charta***,** been invested with the discretion, under the guidance of impartial judges, of passing on a personal liberty of the citizen, and of life itself, is called upon to fix in its discretion the extent of the punishment that shall be inflicted ... We know of no tribunal where such discretion could be more safely lodged." Judicial sentencing has long been thought to be inconsistent with the overall structure of the justice system of this Commonwealth. "Under our state constitutions, neither the life or liberty of the citizen is made to depend, when charged with crime, as to the extent of the punishment, upon the arbitrary will of the judge; but in all cases when indicted for a criminal or penal offense, involving his life or liberty, or subjecting him to a fine, he is entitled to a trial by jury, and that tribunal must not only find him guilty, but also fix the punishment." *Id* at 238.

King Henry II introduced the criminal jury trial at the Assize of Clarendon in 1166. Rembar, Charles, *The Law of the Land*, Pg. 145. 1980. Perhaps the most notable characteristic enabling that institution to endure since the twelfth century is the concept of one being tried by his peers who are residents of the vicinage in which the offense is charged. The vicinage right is mutually just for the defendant and the community [prosecution] in that the immediate society against which the defendant is accused of transgressing, determines his guilt or innocence. 47 Am. Jury. 2d, *Jury* § 27 (1995). The inherent democracy in this mode of justice is accentuated where the jury determines the appropriate punishment

for the offense. Thus, sentences varying between the localities of the Commonwealth, rather than being coldly identical, is a triumph of the institution and the community.

An informed scepticism of judicial sentencing has prevailed for the two centuries this Commonwealth has governed itself. In contemporary courts other than this Commonwealth, we have observed a resentment to judicial sentencing from the defense bar, prosecutors, and judges - the very phenomenon which some now seek to change. When Kentucky once before tried judicial sentencing, our General Assembly, as Tocqueville in *Democracy in. America*might have predicted, hastened to reestablish the role of the jury. We would be prudent to heed the message of that past action, and to note that judicial sentencing elsewhere has proved to be a cause - not a cure - of the disparity in sentencing which some seek to change.

The bottom line seems to be, do we wish to maintain the inalienable right of jury sentencing of those who are found guilty, or to change that procedure to judicial sentencing which must necessarily adopt guidelines to achieve the uniformity that those who advocate judicial sentencing state will result. The fallacy of this position is easily recognized when we look at individuals who plead guilty without the intervention of a jury and the sentences that are imposed by judges on those guilty pleas. The latest figures that I have seen indicate that over ninety percent of criminal cases are resolved by defendants entering guilty pleas pursuant to plea bargaining. In these situations, the judge alone decides the sentence without jury intervention. That process does not produce uniformity, therefore, how can it be argued that with judicial sentencing you are going to have uniformity. I submit you cannot. What then must be done to attempt to assure that uniformity - guidelines. This raises the following questions: who establishes the guidelines, how are the guidelines established, and will they allow a variance under the circumstances of each individual case (*i.e*., the subjective considerations that are to be found in every case that differentiates it from other cases' with similar charges). Who do you trust? The jury to impose the sentence relying upon the local views, opinions and mores; or the judge, who imposes the sentence and then has to use guidelines that are imposed by some bureaucratic edict?

I submit to you that although jury sentencing is not perfect, that neither will judicial sentencing achieve the perfection being sought. Therefore, "change for the sake of change is not progress, it is chaos."

Deja vu ... All over again!

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Amendments, Economic Development, & Judiciary Committees in the House. Gross is recognized as an influential legislator, especially on criminal justice issues, as a practitioner of 39 years.

ABA Notes Kentucky's RJA

The August 1998 *ABA News At A Glance* stated: "Just 18 months after the ABA called on the U.S. to cease executing people convicted of capital crimes until the death penalty could be administered fairly, and with minimal risk of executing innocent persons, the policy is influencing legislatures and courts, and shaping international debate. A new report by the ABA Section of Individual Rights and Responsibilities, which originated the ABA resolution, shows that while the death penalty continues to be administered, numerous jurisdictions have begun to re-examine their capital punishment policies. The report, the draft version of which was released in Toronto, looks at what the United Nations, state legislatures, bar associations and other national and international organizations have been doing in the wake of the ABA's resolution. The report specifically cites legislative action in Kentucky where state legislators adopted a Racial Justice Act in March. The statute allows use of statistical evidence of racial discrimination to show that the race of either the defendant or the victim affected a decision to seek the death penalty. The report is available at http://www.abanet.org/irr/ contents.html

Return to the Table of Contents

The Advocate, Vol. 20, No. 6 (November 1998)

The Kentucky Felony Sentencing Process

Presumption of: Probation, Conditional Discharge, Alternate Sentence

1. Pretrial diversion may be used for persons charged with a Class D felony with some limitations. KRS Chapter 533.

2. There is a felony trial on guilt/innocence where the victim of the offense often testifies.

3. If jurors convict on a felony count, a felony sentencing hearing, KRS 532.055 is then conducted before the same jurors who fix the degree of the offense and the penalty (RCr 9.84) within the range provided by the law, and recommend to the judge whether the sentences should be served concurrently or consecutively, KRS 532.055(2).

4. Evidence the prosecutor may offer to increase the sentence at this sentencing hearing:

    A. Minimum parole eligibility;
    B. Prior felony and misdemeanor convictions and their nature and dates;
    C. Maximum time the defendant could serve on current and prior offenses;
    D. Defendant's current status: probation, parole, conditional discharge, or other release;
    E. Juvenile records for offenses that would be a felony if committed as an adult;
    F. Impact of the crime on the victim, as defined in KRS 421.500, including the nature and extent of physical, psychological, financial harm, KRS 532.055(2)(a)(7).

5. Evidence the defendant may offer to decrease the sentence at this sentencing hearing:

    A. evidence in mitigation; and,
    B. evidence in support of leniency, KRS 532.055(2)(6).

6. This felony sentencing hearing is combined, KRS 532.055(3), with any persistent felony offender sentencing hearing, KRS 532.080, and with any capital sentencing hearing, KRS 532.025.

7. The judge then has a presentence investigation conducted by the probation and parole officer identifying treatment needs of defendant and resources available or not available, KRS 532.050(5). If a sexual offender treatment program evaluation is conducted, a copy of it shall be given to the prosecutor and defendant.

8. Under KRS 421.520, the prosecutor is required to notify the victims that they can make a written statement to be

included in the presentence investigation report that can include:

A. Description of physical, psychological or financial harm;
B. Need for restitution;
C. Whether the victim has applied for or received compensation for financial loss; and,
D. The victim's recommendation for sentence.

9. The judge considers all this information and *shall* sentence to probation or conditional discharge unless the defendant is a violent felon, KRS 439.3401, or another statute prohibits probation or the judge finds imprisonment is necessary for one of 3 reasons, KRS 533.010(2)

10. If probation is not ordered, an alternative sentencing plan *shall* be granted unless imprisonment is necessary for one of 3 reasons, KRS 533.010(3)

11. If the defendant is sentenced to imprisonment, the length of the sentence set by the judge can be either that fixed by the jurors or any lesser sentence for that class of the offense.


Return to the Table of Contents

The Advocate, Vol. 20, No. 6 (November 1998)

Report

DPA Logo

of the

Public Advocate's Workgroup on Defender Professionalism & Excellence

Led by Alma Hall, Ph.D.

August 1998

The ability to perceive or think different is more important than the knowledge gained.

- David Bohm

* * * * * * * * *

To venture causes anxiety, but not to venture is to lose one's self... And to venture in the highest is precisely to be conscious of one's self.

- Søren Kierkegaard

* * * * * * * * *

Whatever you can do, or dream you can, begin it, boldness has genius, and magic in it.

- Goethe

Table of Contents

I. Introduction

A. **Statement of the Problem**: On January 30, 1998, Public Advocate Ernie Lewis convened the Department of Public Advocacy (DPA) Workgroup on Professionalism and Excellence. He recognized that each member of DPA desires an environment in which work is significant and meaningful and that the current culture of the organization is not healthy. He charged the group to discover how to change that culture in order to better help clients.

B. **Participants**: The work group consisted of Kathryn Power, Margaret Case, John Niland, Tom Glover, Shelly Fears, Roger Gibbs, Carolyn Keeley, Harolyn Howard, Lynn Aldridge, Madeline Jones, Vince Aprile, Tammy Havens. Ed Monahan facilitated and Alma Hall, Ph.D. led the group.

C. **Research Questions**: The work group set out to answer the following questions: What is a culture of professionalism and excellence? What is the present culture of DPA? How is DPA characterized as an organization? What changes need to be made in order to achieve a culture that will better serve those who work together to help clients?

D. **Process**: Field research was chosen as the methodology because of the exploratory nature of the study[1]. The group met 6 times and reviewed work via e-mail. They first examined their personal views on the culture and organization of DPA and then examined the organization through a series of guided questions (Bolman & Deal, 1991). Preliminary recommendations were circulated throughout DPA for feedback.

II. Findings

A. What is a culture of Professionalism and Excellence?

The work group defined the achievement of a culture of professionalism and excellence in the following way:

> *Professionalism and Excellence are achieved when every member of the organization is prepared and knowledgeable, respectful and trustworthy, and supportive and collaborative, in an environment that celebrates individual talents*

and skills, and which provides the time, the physical space and the human, technological and educational resources that insure high quality representation of clients, and where each member takes responsibility for their sphere of influence and exhibits the essential characteristics of professional excellence.

B. **What are the tenets of such a culture?**

The work group suggested that an organizational culture of professionalism and excellence would be made of individuals who display the following beliefs and behaviors:

- Considerate yet demanding
- Independent yet team oriented
- Supportive yet honestly critical
- Principled yet tolerant
- Trusting and trustworthy
- Respectful and respected
- Committed and zealous
- Continually improving
- Persuasive and persuadable
- Welcoming feedback
- Free to express opinions
- Listening
- Appreciative of good work and unwilling to accept inferior efforts
- Dedicated to serve

C. **What is the present culture of DPA?**

The group began their examination of the present culture of the Department of Public Advocacy by creating a play dough "totem pole" of symbols. The exercise was chosen as a

means of moving participants away from what may be a preference for analysis and into a more metaphorical accounting. The "story pole" constructed by participants described the following culture of DPA:

In the early days defenders were rabble rousing, non-conformist. All employees were brave then, stepping forward and taking on those cases and clients that others shunned, providing help to clients who were people caught in difficult circumstances. The agency arose out of the dual beginnings of litigation (lawyers suing the state because the state paid them no money for their professional services) and assistance to the poor.

At present, DPA is an organization that cares for clients, for each other, for a system of justice, for fairness, and for due process. Yet the public sees the caring as wrong because of the kind of crimes the clients commit. Negatively, the organization feels trapped by not being in a position to marshal the support of other people. At the same time they are positive in their never ending service to the client. Most people work at DPA because they believe in core values that are rooted in the constitution and are not just bleeding hearts. All employees share high ideals, a sense of mission and purpose, faith in the Bill of Rights, and the belief that what is done has a bigger purpose than the individual acts. They become sad because they work too hard and see a lot of injustice. Also, there is fragmentation in the organization when Frankfort and the field offices do not get the same view of the goal.

D. **How is DPA characterized as an organization? What changes need to be made in order to achieve a culture of professionalism and excellence?**

1. **Responses based on geography and occupation**: Perspective of the individual members varied according to where they worked and the job they performed. Some members of the work group defined *organization* as "something we do collectively" while others defined it as something that is done for us, *i.e.*, "a delivery system that sends beans, bandages, and bullets to the platoon level." Other field offices, contract counties, and non-profits were also frequently seen as "them," yet, members of the group asserted that Kentucky defenders represent clients with the help of others, often a team of secretary, investigator, paralegal.
2. **Responses based on cognitive frames:** Perspective was not only determined by the member's location and vocation but also varied depending on the cognitive frame through which each group member viewed organizational events and people. Work group members determined their preferred frame by rating themselves on an instrument. (Bolman & Deal, 1990). They then answered a series of questions about the organization from the perspective of their preferred frame.

    a. **The structural frame** emphasizes goals and efficiency. It suggests that

effective organizations define clear goals, differentiate people into specific roles, and coordinate diverse activities through policies, rules, and chain of command. Responses from the structural frame considered primarily whether the organizational design or the policies and procedures of DPA need to be changed in order to achieve a culture of professionalism and excellence.

Structure received attention in the following areas: (a) the need to allocate budget and decision making to the closest point of service and, (b) the need for a *real statewide organization*. In addition, one individual suggested redesign to create more coordination between Protection and Advocacy and the other branches. Also, one individual suggested that a Capital Resource Unit should be formulated in each trial office and that each qualified attorney should carry at least one capital case at any time.

Policies were thought to need to better reflect the team approach. Further, policies should be clearly stated and applied equally to each member of the respective divisions. On the other hand, members suggested that P & P is "starting to look like the tax code."

b. **The human resource frame** focuses attention on human needs and assumes that organizations that meet basic needs will work better than those that do not. Responses from the human resource frame considered primarily the issues of communication and education.

Communication effectiveness was the area deemed most in need despite the recognition that the current leadership has made great strides in providing a downward flow of information and has done an incredible job of externally communicating with the legislature. More upward and lateral

communication was suggested. Work group members recognized that regular staff meetings help but that scheduling is difficult. One member suggested that communication between field offices and Frankfort seems to vary depending on the abilities and energy of the directing attorney. Another suggested that inter-office communication between field offices is the issue:

> Each field office has resources, often underutilized, which could be shared. Relationships never develop for fear it will lead to an increase in the work load. This fear paralyzes us into shunning cooperation. Once we break down barriers preventing cooperation, we may find friends and allies, which could make all of our offices more productive.

Overall, however, there was a recognition that employees have to learn to seek supportive and corrective communication frequently and that supervisors need to learn how to effectively give it.

Education, specifically the question of what programs need to be offered to educate DPA members regarding Professionalism and Excellence, was also considered within the Human Resource frame. While the group stressed the need for education, they recognized that professionalism and excellence "must be incorporated into every program" including hiring and evaluation. Still others recognized that a culture of excellence must be spread by the current use of the Public Advocate's newsletter and *The Advocate*. Actual suggestions for training ranged from team building to cognitive complexity, *i.e.*, learning to hold competing perspectives in mind, and included leadership development and interpersonal communication.

c. **The political frame** assumes that effective organizations compete among different interests for scarce resources and that conflict is nothing more than a normal byproduct of collective action. No members of the work group rated themselves highest in the political frame, therefore, all group members responded. Those responses looked primarily at the alliances and the resources that would promote a culture of Professionalism and Excellence.

Alliances were of doubtful value to one member of the group who suggested instead that allies be formed through inter-departmental activities. Others overcame their initial suspicion of alliances. One member even suggested that the "renegade" culture had been promoted too much. The group suggested the following beneficial alliances: (a) between divisions and sections, including field offices; (b) among local bars, judges and professional groups in which defenders would share their vast knowledge; (c) directing attorneys with regional managers and trial division director; (d) representatives of local offices with legislators, and (e) an enhanced statewide and local alliance for funding, substantive legislation, and policy.

Tangible resources such as computer software, adequate salaries, additional staff and work places comparable to those of private attorneys were listed as needed by several group members. Others, however, cited the need for intangibles such as enforcement and modeling of P & E by leadership, learning how to accept responsibility with independence, pride and desire and talent, and the resources of fostering defender commonalty rather than divisional or work unit separateness and information from other perspectives in the system.

d. Finally, **the symbolic frame** sees a chaotic world in which facts are interpretation and meaning is a social creation. Effective organizations survive chaos by developing a culture that shapes human behavior and provides a shared sense of mission and identity. Responses from the symbolic frame looked at how DPA can transfer the core values and model the behaviors of professionalism and excellence.

Transfer of values, the group generally agreed, must be transferred top down through example, influence, and training. "Leaders should be selected who will reinforce the positive performance of employees, who will work toward the development of the individual skills of each employee, not only in their office but in others as well." It was also suggested that long-time DPA members should work to incorporate new employees into the organization through welcoming activities, mentoring, sharing the agency's lore, and advising.

Modeling of the behavior of professionalism and excellence must be recognized, rewarded and given credibility. Group members further suggested that everyone must embrace the idea that DPA is a team of attorneys, support staff, and management, and that DPA should function as a team focused on making everyone look good not just one at the expense of

others. Group members suggested that the organization needs more leaders at all levels and that they, as well as top management, must use the creed to guide their behavior. Finally, the group suggested that an award be given for professionalism and that it be determined by interested parties outside of DPA.

II. **Recommendations**

A. How can DPA achieve a culture of professionalism & excellence?

1. **Adopt and publicize performance standards.**
    - Build on NLADA standards and complement with our own

2. **Allocate responsibility, authority and accountability for decisions at an appropriate level as close as possible to the point of service.**
    - Each work unit should constantly seek ways to improve.

1. **Allocate decisionmaking to the lowest level possible.**

2. **Make Policy & Procedure Manual more accessible.**

3. **Create a review process for policies/procedures**
    - Directors and their managers should quarterly review the Policy & Procedure Manual and make recommendations to the Leadership

Team on changes.

4. **Encourage enhanced communication as the responsibility of each member.**

    - Defense team members for a particular client should consult with members of predecessor teams as appropriate for the benefit of their common client.
    - Trial attorneys should communicate more effectively to appellate and post-conviction attorneys and fully understand what these branches can do for trial attorneys and their clients.
    - Appellate attorneys should consult with trial attorneys on appeals.
    - Promote lateral communication between and among divisions, offices and staff. Trials, appeals and post-conviction should freely and habitually consult on both particular cases and general issues. Field supervisors should be given the opportunity to brainstorm, consult and exchange ideas on a regular basis. All staff should be encouraged to reach out to DPA colleagues in other offices and to utilize new technology for better communication.
    - Each individual unit is responsible for communicating with each other, for having staff meetings in which problems are addressed and for communicating with levels above them.

1. **Foster the education of everyone associated with DPA on professionalism beyond *legal* professionalism and ethics, and on the benefits of having an organization.**

    - Long-time DPA members should work to incorporate new employees into the organization through welcoming activities, mentoring, sharing the agency's lore, and advising.

2. **Educate everyone in DPA on collaborating on behalf of clients.**

    - Learn how to be part of alliances to help advance DPA's mission.
    - Translate the concept of interdependence into action by training and advising all on becoming more political and being more involved in the legal community and justice system.
    - Learn the benefits to our clients of having an organization, and how to build the organization to better benefit clients.
    - Encourage employees to belong to professional associations.

1. **Conduct case reviews in capital and other serious cases with appellate or post-conviction reviewers assistance.**

2. **Develop Public Relations campaign.**

    - DPA speaker's bureau to whose timely and interesting presentations on legal topics can help to educate those involved on the purpose and values of DPA.
    - Develop a public relations panel with members from every office. Actively work on promoting better public awareness and appreciation of what we do and why. Change attitudes toward ourselves and our clients. The better public image we have (and exposure) the less likely we and our clients will be abused or mistreated in pay, personnel and general consideration.
    - Renew the public education committee.

3. **Identify and reward the individuals who exhibit the dimensions and behaviors that define professionalism.**

    - Be on the lookout for unprofessionalism and work on eliminating it.
    - Make the probationary period more meaningful.
    - Publish one profile of professionalism and excellence in each *Advocate*.

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Footnotes

1. Field researchers, according to Wagenaar and Babbie (1986), investigate various types of social phenomena including meanings (culture and norms) and practices (behavior). Although field research is often more valid than surveys and experiments and, thus, yields much greater understanding of a phenomenon, it suffers from lower reliability. Purposive sampling, used in this study, increases reliability and enhances the ability to generalize to a larger population.
Schatzman and Strauss (1973) observe that the discovery process in field research and the questions raised by the researcher need not be related to any prior theory nor to any explicitly formulated hypotheses. What the researcher does need, they say, is some theoretical framework for gaining conceptual entry into his subject matter and for raising relevant questions quickly. The Bolman and Deal (1991) notion of cognitive frames served that purpose here.


Return to the Table of Contents

The Advocate, Vol. 20, No. 6 (November 1998)

Professionalism and Excellence
Profile: Cindy Long

I was trying a DUI 1st case in Lyon County in the spring of 1997. Cindy Long had only recently been promoted from a legal secretary to a field investigator. She was still just feeling her way in her new job. No one had ever taught her what to do or how to do it. Cindy was merely relying upon her native intelligence and common sense. Our client was a truck driver arrested at Fuel City off of I-24. As the trial developed two factual questions emerged, which would decide the case. First, how far was it from the last set of fuel pumps to the end of the pavement. Second, could a cop in his cruiser see the hands of our client at two and ten o'clock on the steering wheel of the truck.

In the midst of the trial I sent Cindy out to find the answers to these questions. She had not been issued a tape measure, so how could she accurately measure the paved area? She went into the truck stop and noticed they had forty foot ski ropes for sale. She bought one with her own money. Cindy took off her shoes to anchor the rope and accurately measured the distance at 100 feet. Next, with her shoes back on, she drove around the truck stop until she found the right model truck, parked her car where the officer said he was stopped, woke up the truck driver, got him into his driver's seat, positioned his hands in the correct position, got back into her car and saw that the cop could not have seen what he testified he had seen.

Based on our report to the court, the jury visited the scene and it took them only twenty minutes to acquit our client. As I reflect back on that day, I remember the tenets we preach: independent, supportive, committed, zealous, persuasive, and dedicated. The critical description to me is imaginative. I read a lot of mystery novels and I develop a relationship with a number of fictional detectives. But no paperback sleuth, not Joe Leaphorn, Spenser, Anna Pigeon nor any of the others, can measure up to a simple, inexperienced, untrained investigator, who out foxed them all.

Cindy began working with DPA in 1984, transferring to DPA's Hopkinsville Trial Office from Volta House (an alcohol/drug treatment facility). Cindy remembers, "I recall when I made that switch, I didn't have a clue what kind of agency DPA was - I just came for the pay increase and the decrease in work responsibility."

She began with DPA as a legal secretary and never imagined that someday she would be promoted to investigator for the Hopkinsville Office when Danny Dees resigned. Danny Dees and Cindy used to sit around and dream of retiring together. Danny announced in June 1996 he was transferring to the Department of Corrections. Over the years, as our office caseload grew, Tom Glover started using Cindy as "his investigator" in the river counties of Caldwell, Lyon and Trigg. "It was that experience that qualified me, along with my associate's degree, to become an investigator," Cindy said.

"Over my years at DPA," Cindy proclaims, "I've come to understand and love the work we all do!" One of the greatest things Cindy ever had said about her was at a Customer Service Facilitator's meeting when someone said to her, "I can't believe you've worked so long with DPA and still feel the way you do about our clients and this agency."

Cindy and her husband, Ron, have two children, Jacob, 23, and Clint, 12. Her family is very supportive of her work and Cindy feels very blessed by that. "At a time in life where some seem to be coasting," Cindy said, "I feel like I've just boarded a roller coaster - I'm having the time of my work life!"


Return to the Table of Contents

The Advocate, Vol. 20, No. 6 (November 1998)

DPA Employee Appreciation Day

Ernie Lewis, Public Advocate

The Journey

We come today to celebrate our journey together. We have so much that unites us. That makes us 1 people. Today we set aside our divisions; our fights; our disagreements. Today we celebrate our journey together.

La-Tsu: *A journey of a thousand miles begins with a single step.*

Our journey is the journey of providing counsel and justice to the poor of Kentucky.

We celebrate the beginning of the journey. We began in the early 70s. A time of strife. A time of youthful idealists wanting to end war, end racism, and fight a war on poverty. We have 3 people who began with us the journey 25 years ago:

Madeline Jones, Legal Secretary, Frankfort
Vince Aprile, General Counsel, Frankfort
Tim Riddell, APA, Post-Conviction, Frankfort

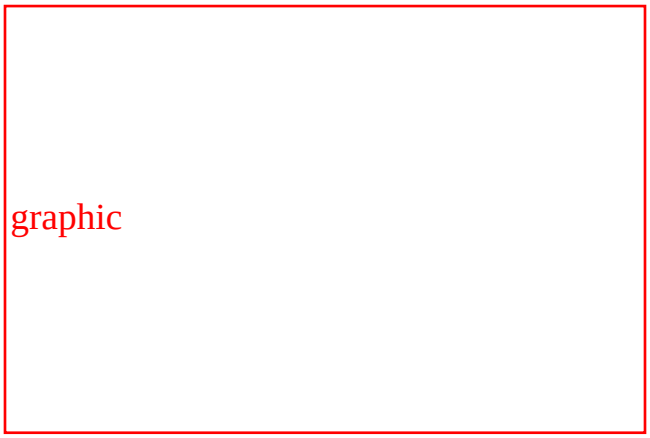
(Left to right) Madeline Jones and Vince Aprile
Not present for picture: Tim Riddell

The Journey Took Off In Its 1st Decade

We became an Appellate Branch and a Post-Conviction Branch. We began Training. We began to try and

monitor death cases. We began to open trial offices in Paducah, London, Hazard, Pikeville, Somerset, LaGrange. We honor 20+ years employees:

Marie Allison, APA, Appeals, Frankfort
Donna Boyce, Manager/Appeals, Frankfort
Ed Gafford, APA, LaGrange Post-Conviction
Ernie Lewis, Public Advocate, Frankfort
Larry Marshall, APA, Appeals, Frankfort
Rodney McDaniel, APA, Frankfort Trial
Ed Monahan, Deputy Pub. Advocate, Frankfort
Dave Norat, Dir., Law Operations, Frankfort
Melodye Steele, Leg. Secretary, LaGrange Trial
Linda West, APA, Post-Conviction, Frankfort
Randy Wheeler, APA, Capital Post-Conviction, Frankfort



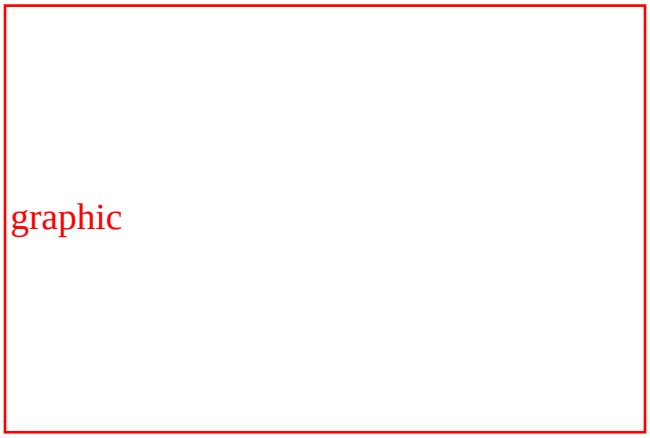
(Left to right): Ed Gafford, Dave Norat, Randy Wheeler, Ed Monahan
Not present for picture: Marie Allison, Donna Boyce, Ernie Lewis
Larry Marshall, Rodney McDaniel, Melodye Steele, Linda West.

We Celebrate Our 2nd Decade

We opened more trial offices. Protection & Advocacy (P & A) matured as an entity. Post-Conviction offices were created. We decided to remain as public defenders. We celebrate the 15+ years employees:

Lynn Aldridge, Paralegal, Eddyville
Kathy Bishop, Legal Secretary, Somerset
Linda Burkhalter, Legal Secretary, LaGrange
Jim Cox, Assistant Public Advocate, Somerset
Hank Eddy, Asst. Public Advocate, Eddyville
Wanda Elam, Legal Secretary, Hazard
Rob Embry, Asst. Pub. Advocate, Hopkinsville
Maureen Fitzgerald, Director, P & A
Joe Myers, APA, Post-Conviction, Frankfort

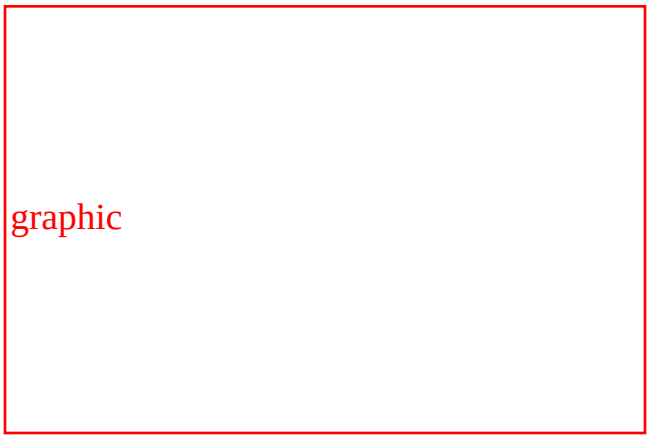
Angie Potter, Legal Secretary, Pikeville
Rob Riley, APA, LaGrange Trial
Bill Spicer, APA, Covington
Marguerite Thomas, Manager, P/C, Frankfort
Beverly Thompson, Legal Secretary, Morehead
Oleh Tustaniwsky, APA, Appeals, Frankfort
Christy Wade, Legal Secretary, Hopkinsville



(Left to Right): Hank Eddy, Linda Burkhalter, Oleh Tistaniwsky, Marguerite Thomas, Joe Myers
Not present for picture: Lynn Aldridge, Kathy Bishop, Jim Cox, Wanda Elam, Rob Embry, Maureen Fitzgerald, Angie Potter, Rob Riley, Bill Spicer, Beverly Thompson, Christy Wade.

And we celebrate the folks who've journeyed with us 10 years as a few new offices opened and as we've matured and grown. We celebrate the 10+ years employees:

Leslie Beckner - APA, London
Lynda Campbell - APA, Richmond
Roy Collins - Personnel Director, Frankfort
Hugh Convery - APA, Morehead
Nancy Bowman-Denton - APA, Elizabethtown
Rebecca DiLoreto - Dir., Post-Trials, Frankfort
Dave Eucker - APA, Appeals, Frankfort
Bruce Franciscy - APA, Stanton
Steve Geurin - APA, Morehead
Tom Glover - APA, Hopkinsville
Julie Namkin - APA, Appeals, Frankfort
Jim Norris - APA, London
Tom Ransdell - APA, Appeals, Frankfort
Gail Robinson - Manager, Juvenile, Frankfort
George Sornberger - Dir., Trials, Frankfort



(Left to Right): Gail Robinson, Lynda Campbell, Tom Glover.
Not Present for picture: Leslie Belkner, Roy Collins, Hugh Convery,
Nancy Bowman- Denton, Rebecca Diloreto, Dave Eucher, Bruce Franciscy
Steve Guerin, Julie Nampkin, Jim Norris, Tom Ransdell, George Sornberger.

The Journey Has Not Been Easy

We celebrate the lives of our fallen champions. We pour ourselves into our work. We each have a story. We each touch the clients and co-workers with whom we come into contact.

For some of us, our journey is long and arduous. For some, the journey ended too soon.

We celebrate those whose lives have ended. We will recognize their presence in the *Hall of Defender Champions*. Hank Eddy, Carolyn Keeley, Teresa Whitaker and Dan Goyette will talk more about that.

We also have problems on our journey. We remember today: Joyce Hudspeth, Rodney McDaniel, Dave Stewart and Ken Zeller.

The Journey Will Continue

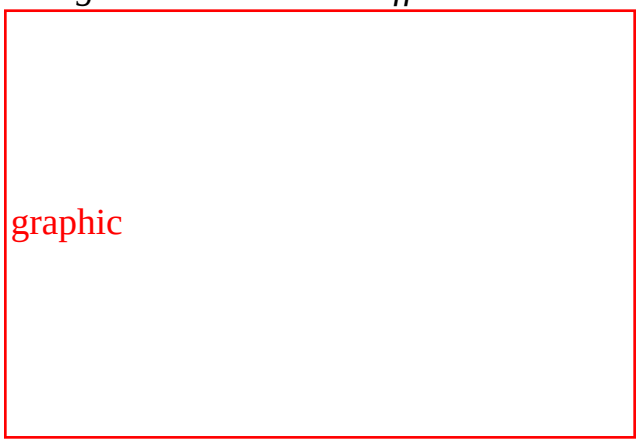
We will fight for our clients.

Today we give thanks for all of you, all of us:

- For attorneys giving up holidays to prepare for a trial the day after New Years;
- For secretaries who stay after 5:00 p.m. to type and file an appellate brief;
- For mitigation specialists for digging deeper and deeper to find those nuggets to save someone's life;
- For investigators for driving and looking and waiting and getting lost and persisting;
- For advocates who patiently listen to persons with mental retardation and mental illness;

- For paralegals hearing the stories of men and women who are warehoused in our state's prisons and who have lost hope;
- For alternative sentencing workers for calling and calling to find just the right placements for a person;
- For the people who pay our checks and fix our computers and set up our offices;
- For all our you who:
    - care enough to help poor people;
    - care enough to do your best;
    - care enough to stay on this journey.

Nelson Mandela spoke to all of us now and in the future when he said: *We have not taken the final step of our journey, but the 1st step on a longer and even more difficult road.*



Members of the Professionalism & Excellence Workgroup: (left to right)
John Niland, Madeline Jones, Tammy Havens, Tom Glover, Carolyn Keeley,
Ed Monahan, Margaret Case & Vince Aprile.
Not present for picture: KAthryn Power, Shelly Fears, Roger Gibbs, Lynn Aldridge, & Harolyn Howard

Return to the Table of Contents

The Advocate, Vol. 20, No. 6 (November 1998)

Update on DPA's Plan 2000

Ernie Lewis, Public Advocate

Lots of good things are happening as Plan 2000 is being implemented. Teams have been formed to plan and implement the many opportunities which were made possible by additional funding provided by the 1998 General Assembly. Some of the things which are happening:

- DPA is working hard to open the five new offices on time. While recruiting and space both may result in a delay, at the present time these offices are scheduled to open by the following deadlines:
- Owensboro—January 1999
- Paintsville—January 1999
- Columbia—January 1999
- Bowling Green—July 1999
- Maysville—July 1999

- Counties are converting from part-time to full-time and are joining existing DPA offices. Already, Nelson, Hart, Larue, Marion, and Washington Counties have joined the Elizabethtown Office, while Union and Webster Counties have joined the Henderson Office.

- Counties which will be converting soon are Muhlenberg and McLean Counties (Madisonville Office), Scott and Anderson Counties (Frankfort Office), and Harlan County (Bell Office).

- The juvenile enhancement project is making a lot of progress. Juvenile attorneys have been hired to join existing offices to enhance the level of juvenile representation as well as lower the caseloads in some of the offices with the heaviest caseloads. Some of those positions are still open. The two new juvenile appellate lawyers have been hired. Recruiting is ongoing for the two juvenile social workers.

- The assistant trainer has been hired. This individual will not only help develop the juvenile training program, he will also assist in enhancing our entire training program.

- $500,000 has been provided to Louisville and Lexington to hire new lawyers, raise salaries, and provide for technology enhancement.

- Part-time public defenders have received a 5% increase in their contracts for this year, and can

look forward to a 5% increase next year as well.

- Two capital conflict lawyers have been hired.

- New full-time office conflict lawyers have been hired. The unavailability of private lawyers willing to participate as conflict lawyers with our full-time offices has resulted in a number of conflict lawyers being hired. This is not intended to shut out private bar participation, but is merely an effort to ensure seamless service to poor people needing counsel.

Much progress has been made! Much is left to be done!

ABA House of Delegates Meet

The ABA House of Delegates met recently and approved three resolutions which will be of interest to Kentucky public defenders:

- One resolution urged all jurisdictions to ensure that counsel is present at bail hearings. It has been my experience that most defendants are not represented by counsel at their initial appearance before a magistrate when bail is set; counsel generally appears on a motion to reduce bail after the initial appearance.

- A second resolution urged Congress to provide more funding for CJA lawyers in federal court, raising fees from $45/65 per hour to $75 per hour. In Kentucky, our $25/35 rates were recently abolished by HB 455. Now the "prevailing rate" is to be set by the Public Advocate. In reality, in full-time offices, low-paid defenders with high caseloads are working at far below these hourly rates. Private lawyers in contract counties operating under a fixed contract system are also working far below these hourly rates. Only in capital cases is Kentucky paying anywhere close to what is being discussed by the ABA. DPA contracts with private lawyers at $50 per hour with a maximum of $12,500 per capital case. In reality, that $12,500 can go pretty quickly, thus causing the hourly rate to plummet.

- A third resolution urged all jurisdictions to adopt minimum standards for the creation and operation of indigent defense delivery systems. In Kentucky, DPA has just adopted the NLADA Performance Standards in its Trial Division. These have been included in the contracts signed by contract attorneys, and are obligatory on all full-time trial attorneys as well. The Post-Trial Division is developing standards for each of its branches. The Trial Division also has adopted the performance criteria in the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. The eligibility criteria contained in those guidelines have not yet been adopted.

Thank You for Mississippi

Mississippi recently created a statewide public defender system. However, when they did so, they failed to create any kind of system for the representation of persons at the post-conviction level, including capital cases.

The Mississippi Supreme Court has recently stepped into the breach. In *Jackson v. State*, 63 Cr. L. 593 (Miss. Sup. Crt. 8/13/98), the Court granted the capital defendant's motion for the appointment of state post-conviction counsel and litigation expenses. In the opinion, the Court urged the creation of a funding mechanism for state post-conviction.

KRS Chapter 31 was a model public defender statute when it was first written. One of its most progressive features was its provision for a mechanism for the provision of post-conviction services. See KRS 31.110(2). While the funding for those services has had a checkered past, particularly in the capital post-conviction arena, Kentucky has avoided the problems of Mississippi and other states with its forward-looking statute.

The Pittsburgh Public Defender Office

The Pittsburgh Public Defender Office had its budget slashed in 1996 by 27%. As a result, there were 2 secretaries for 48 lawyers, juvenile lawyers carried caseloads of 700, probation and parole lawyers conducted 3000 hearings annually, while mental health attorneys conducted 4500 hearings. There was no training, no conflict policy, and no caseload tracking system.

The ACLU sued, and recently that lawsuit was settled. While the details are not available, many of the problems created by the slash in funding will be addressed.

The Hatchett Report

I read with interest the recently published report by Edward B. Hatchett, Jr., the Auditor of Public Accounts in Kentucky. The article is entitled *Guardian ad litem practices in the Commonwealth of Kentucky*. This is an interesting study for purposes of this article for people who long for a return to the days of providing public defender counsel in Kentucky through the assigned counsel method.

The author of the report notes the following problems with the Kentucky guardian at litem program:

- Inadequate research and investigation of cases.
- Representation ends at the disposition hearing.
- Training of guardians is not provided.
- Administration of guardians is "inconsistent throughout the state and lacks effective oversight."
- "No single agency has the responsibility of ensuring guardians ad litem are performing adequately

and that necessary training and support needs are met."
- No specific agency or organization has been given the responsibility for the guardian program.
- Fees for guardians ($250 in district court and $500 in circuit court) "may not provide an incentive for performing the necessary duties in lengthy, complicated cases."

We are fortunate in Kentucky that the public defender program is not in this shape. We are fortunate that Gov. Ford, the KBA, many private lawyers, and others had the vision of creating a statewide public defender system in Kentucky in

the early 70s. DPA as created has and can continue to meet many of the criticisms addressed in this report. DPA provides the training, the administrative oversight, and the accountability that the guardian program lacks. Inadequate funding can certainly inhibit DPA's ability to perform these functions in a high quality manner. But it is in the light of this report that Kentucky's excellent public defender statute shines most brightly.

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Return to the Table of Contents

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Fax (502)564-7890
Field Offices

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Capital Post-Conviction	Joyce Hudspeth	#332	Joyce.Hudspeth@ky.gov
Capital Trials		#131	
Computers	Ann Harris	#130	AnnW.Harris@ky.gov
Eastern Region	Scott Richard	#282	Scott.Richard@ky.gov
Frankfort Region	Andy Forester	#258	Andy Forester@ky.gov
Western Region	Fortune Royce	#280	Fortune.Royce@ky.gov
Contract Payments	Ruth Schiller	#188	Ruth.Schiller@ky.gov
Education	Lisa Blevins	#294	Lisa.Blevins@ky.gov
Frankfort Trial Office	Rodney Barnes	(502) 564-7204	RodneyD.Barnes@ky.gov
General Counsel Office	Lisa Blevins	#294	Lisa.Blevins@ky.gov
Juvenile Post-Dispositional Unit	Edward Clark	#220	Edward.Clark@ky.gov
Law Operations	Karen Scales	#111	Karen.Scales@ky.gov
Library	Will Geeslin-Librarian	#120	Will.Geeslin@ky.gov
	Library Asst.	#119	Kimberly.Cribbs@ky.gov
Payroll/Timesheets	Beth Roark	#136	BethC.Roark@ky.gov

Human Resources	Alfred Adams	#116	AlfredG.Adams@ky.gov
Post-Trial Division	Jessie Luscher	#310	Jesse.Luscher@ky.gov
Properties	Larry Carey	#218	Larry.Carey@ky.gov
Protection & Advocacy	Lou Ann Brooms	(502) 564-2967 OR #276	LouAnn.Brooms@ky.gov
Public Advocate's Office	Shannon Means	#108	Shannon.Means@ky.gov
Recruiting	Karen Scales	#111	Karen.Scales@ky.gov
Travel Vouchers	Ruth Schiller	#188	Ruth.Schiller@ky.gov
Trial Division	Sherri Johnson	#165	SherriL.Johnson@ky.gov

Updated: September 21, 2004

The Advocate, Vol. 20, No. 6 (November 1998)

DPA's Revenue Picture

Ernie Lewis, Public Advocate

The revenue picture for the Department of Public Advocacy during the fiscal year 1997-1998 is coming into focus. I will look at what we are finding and also make some preliminary observations about the data.

Readers will recall that the DPA receives revenue from three sources in addition to the General Fund. First, DPA receives a $40 (now $50 under HB 337) administrative fee for each public defender appointment. KRS 31.051(2). Second, DPA receives $50 from each DUI conviction as 25% of the service fee. KRS 189A.050(4). Finally, DPA receives recoupment moneys ordered by the trial court for persons who are found to be able to afford some of the Chapter 31 services they receive. Recoupment is returned to the county public advocate fund in those places where there is no full-time office. KRS 31.051(1). The first two fees go to DPA for delivery of services statewide.

DPA is highly dependent upon revenue for delivery of services. Little revenue goes toward administration. Rather, all of the revenue received either goes back to the county public advocate fund or is spent for the delivery of services. At present, revenue goes to support the programs in Jefferson and Fayette Counties, the Covington Office, the Capital Trial Branch, Appellate Branch attorneys, several trial attorneys, the Capital Post-Conviction Branch, and the Henderson, Madisonville, and Elizabethtown Offices. The services funded by revenue amount to approximately $3.5 million of DPA's approximate $20 million public defender budget.

In 1997-1998, the sum of the three revenue sources was approximately $2.8 million. Following this article is a county breakdown of this revenue and the defender cases in each county. DPA is thus spending approximately $700,000 more in revenue than it is taking in. While a significant surplus from these funds was present in 1996, at the present rate of spending, this surplus will disappear in July of 2000. This is why the revenue picture for DPA is so significant. Without a change in the revenue picture, DPA will have to cut vital services.

HB 337 Will Make A Difference

The 1998 General Assembly passed HB 337. This bill amended KRS Chapter 31 to change the PA or administrative fee from $40 to $50. This $50 fee is to be accompanied by a handling fee of $2.50, which will go to the clerk for their handling of the fee.

This modest change in the PA fee will improve DPA's revenue picture substantially. It is estimated that approximately $160,000 more will be raised by this statutory change.

In addition, it has been found that when other parts of the criminal justice system benefit from a fee, that behavior can change. It is believed that the $2.50 handling fee for clerks will improve the collection rate.

Observations and Analysis of the Statewide Data

I have been looking over the figures and have several other observations to make. I have one significant caveat: I am not a statistician, and many of my observations are made based upon equations I have applied to the data. If anyone has a problem with my observations, they are mine alone. Be that as it may, the figures tell me the following:

- Recoupment appears to be in good shape for the time being. In 1997-1998, $995,582 was recouped from indigents. This was a 10% increase over the previous year. Many of our county public defender programs are highly dependent upon this revenue source. For example, Fayette County recouped $187,671, which exceeded the county's contribution, and constitutes about 20% of their budget. Barren County's recoupment figure of $24,615 and Daviess County's figure of $60,120 represent several of the successful county recoupment programs.
- The DUI service fee is likewise supplying a significant revenue stream to DPA. In 1997-1998, the service fee brought in $1,120,711. This was approximately $3500 below the previous year. This fee has become a stable, predictable source of revenue.
- The problem remains the PA or administrative fee. In 1997-1998, the PA fee generated $691,650 in revenue. This was 9% above the $666,894 of 1996-1997. It represents a fee paid in about 17,291 of our 100,000 cases that year.
- If the PA fee were collected in 50% of DPA's 100,000 cases each year, DPA would generate $2,500,000 annually. Not only would DPA's revenue picture move back into the black, but also $1,800,000 in additional services could be provided.
- The PA fee is collected in only 17% of the cases (figured by dividing $40 into the total amount. DPA is working to obtain from AOC a thorough account of all of the PA fees ordered and collected).
- Many counties are collecting the PA fee at a high rate. (*see data that follows this article*)
- Full-time DPA Offices are not collecting PA fees at a high rate. In Paducah, the PA collection fee rate was 20%, Pikeville (16%), Richmond (16%), LaGrange (16%), London (14%), Hopkinsville (24%).
- The collection rate in Jefferson County remains one of the lowest fees collected. In 1997-1998, only $51,521 was collected. That represents 1288 fees out of approximately 27,899 trial cases. Thus, while Jefferson County represents about 30% of the trial public defender caseload, and has approximately 28% of the population, they generate only 7% of the total revenue from the administrative fee.
- If Jefferson County is excluded from the picture, we are collecting PA fees in approximately 24% of the cases.
- Size of the county is not necessarily determinative of the successful collection of PA fees. Rather, size appears to be irrelevant, as seen by the desperate figures that follow. There was a 10% rate in

Kenton, a 27% rate in Fayette, a 9% rate in Warren, a 15% rate in McCracken, a 33% rate in Campbell, and a 41% rate in Boone.

- Many small counties have poor collection rates, for example: Bourbon (16%), Breathitt (13%), Casey (14%), Clay (10%), Estill (4%), Livingston (15%).
- Many small counties have good collection rates: Ballard (58%), Butler (42%), Crittenden (49%), Edmondson (67%), Fleming (50%), Hickman (56%), Jessamine (57%), Lewis (49%), Menifee (54%), Muhlenberg (50%), Nelson (50%), Ohio (91%), Webster (80%).
- Poverty is a factor in the collection of PA fees, but it is not determinative. In Ballard County, there is a 18% poverty rate and a 58% PA collection rate. In Boone County, a 7.3% poverty rate compares to the 41% collection rate. In Breathitt, with its 38% poverty rate, 13% of cases involved a PA fee collected. In Jefferson County, with its 13% poverty rate, there was a 4% PA collection rate. In Jackson County, with 38% poverty, there was a 16% collection rate. In Leslie County there is a 35% poverty rate with a 25% collection rate. In Floyd County there is a 31% poverty rate with a 36% collection rate. In Monroe County there is a 26% poverty rate with a 45% collection rate. In Fayette County there is a 13% poverty rate and a 27% collection rate.
- We collect more DUI fees than PA fees. In 1997-1998, 17,291 PA fees were collected while 22,414 DUI service fees were collected.
- The existence of a high rate of recoupment does not necessarily lead to a low rate of PA fee collection. Ballard County collected $11,936 in recoupment with a 58% PA collection rate. Barren County collected $24,615 in recoupment with a 25% PA collection rate. Boone County collected $46,064 in recoupment with a 41% PA collection rate. Crittenden collected $12,765 recoupment with a 49% PA collection rate. Jessamine collected $23,681 in recoupment with a 57% PA collection rate.

What Can Be Done by Defender Administrators, Judges, Clerks?

The Commonwealth of Kentucky is responsible for funding an adequate public defender system for poor people accused of or convicted of crimes. At present, 17% of DPA's budget is paid from fees generated primarily from poor people. It must be understood that while DPA is going to do everything it can to make the revenue program function effectively, revenue from poor people can never replace the general obligation that the people of Kentucky have to fund Kentucky's public defender system reasonably and adequately.

Having said that, several ideas come to mind:

- Administrators of the public defender systems at the local level must communicate with their judges and clerks regarding the importance of revenue. This is an administrative job of the head of the office rather than the job of the individual attorney in the individual case.
- We must educate clerks about the importance of the collection of revenue to the delivery of services to poor people in Kentucky, and that we need their help. Clerks also should understand that for every PA fee collected, $2.50 will be going to the clerks in a non-lapsing fund.

- Judges must do all they can to make this program a success. Most judges in Kentucky are doing an admirable job assessing fees in an appropriate manner.
- Judges should get in the practice of assessing a $50 in *every public defender case* permitted under the statutory criteria. Again, if $50 were to be collected in only half of all public defender cases, DPA's revenue problems would be gone, and $1.8 million would be available to solve DPA's other chronic problems.
- Judges should also monitor the collection of these fees. DPA is presently engaging in an experimental program of collections using HB 337's civil judgment provisions in 6 counties: Kenton, Laurel, Oldham, Jefferson, Hart, Franklin. DPA is doing all it can to find an effective means to collect these funds.
- Judges should utilize the liberal waiver provision of KRS 31.051. People who are in custody or who are too poor to pay the fee should have the fee waived.
- Judges should not jail persons who do not pay. Rather, HB 337 changes the failure to pay into a civil judgment.
- Everyone in the system needs to understand the importance of this revenue collection to the success of all of DPA's public defender services.

It is too early to judge the effect of the changes made by HB 337. I will continue to communicate regarding DPA's revenue picture by sending to courts a quarterly report as well as communicating in *The Advocate.*

Please give me your thoughts on how we can improve this process.

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I tell them that if you stay committed, your dreams can come true. I'm living proof of it. I left home at 17 and had nothing but rejections for 25 years. I wrote more than 20 screenplays, but I never gave up.

- Michael Blake,
author of *Dance with Wolves*

PA Fee, DUI Fee, Recoupment Fee, and Caseload by County for FY 1998


Return to the Table of Contents

The Advocate, Vol. 20, No. 6 (November 1998)

Trial Division Restructured

Ernie Lewis, Public Advocate

The Department of Public Advocacy has received approval from the Public Protection and Regulation Cabinet and the Governor's Office for the restructuring of the Trial Division. Administrative Order 99-01 was effective September 16, 1998. This administrative order accomplishes several things:

- It enables five additional DPA offices to open in Owensboro, Paintsville, Columbia, Bowling Green, and Maysville. These offices were funded by the 98 General Assembly, and will be opening during the next sixteen months.

- It creates the positions that will be needed to staff the five new offices as well as the other positions funded in Plan 2000.

- It abolishes the contract branch manager position. John Niland, present Contract Branch Manager, will move into the newly created regional manager's position for the Central Region.

- It establishes five regions in the Trial Division. These regions are the West, Central, North, East, and Bluegrass. These regions will be managed by five regional branch managers who are supervised by the Trial Division Director. One additional regional manager will be hired.

- The biggest change the administrative order will accomplish is the shifting to a regional system of contract county supervision. Previously, regional managers supervised only full-time offices. Contract counties, now numbering 68, were supervised by one contract branch manager. Henceforth, regional managers will manage an entire region, including full-time offices and contract counties alike. 119 counties will be within this structure. The exception will be Jefferson County, which will be tantamount to its own region. Meetings of the Trial Division will involve the Trial Division Director, the five regional managers, the Capital Trial Branch manager, and the head of the Jefferson County District Public Defender's Office.

- This should result in a higher level of supervision.

- Regional solutions to problems will become the norm. Regional managers will be more familiar with judges, prosecutors, local defense lawyers, and other local situations which will assist them in managing their regions.

- George Sornberger, Trial Division Director, and John Niland, Contract Branch Manager, will be working on a plan to transition to this new method for running the Trial Division.

- Following this article is DPA's new organizational chart.

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> Success seems to be connected with action. Successful people keep moving. They make mistakes, but they don't quit.
>
> - Conrad Hilton

Return to the Table of Contents

The Advocate, Vol. 20, No. 6 (November 1998)

Prerelease Probation - What Trial Attorneys and Their Clients Need To Know

Joe Myers and Tina Scott, DPA Post-Conviction Branch

This is the second in a series of articles that The Advocate will feature discussing the Prerelease Probation Program created by the 1998 Kentucky General Assembly in HB 455. The first article, in the September 1998 edition of The Advocate, by Vertner L. Taylor, Deputy Commissioner for Community Services and Local Facilities in the Kentucky Department of Corrections, offered the Probation and Parole perspective on this topic. It also presented legal, procedural and administrative components of this program.

No one can dispute that HB 455, with its many changes and additions, will demand more from the criminal justice system and its participants.

A good example of this can be found in Section 119 of the Bill, which created KRS 439.470, better known as Prerelease Probation. The statutory language clearly states that in order to receive Prerelease Probation, the inmate must get approval from both the sentencing court and the Department of Corrections. As Vertner Taylor's Advocate article noted, the Kentucky Department of Corrections will play a major role in processing and approving requests by inmates seeking release from prison.

In order to advise clients about Prerelease Probation accurately at the trial level, the criminal defense lawyer needs to become familiar with the enabling legislation, the Corrections Policy and Procedure (CPP) No. 27-11-02, the Kentucky Department of Corrections (DOC) Prerelease Probation Risk Assessment Scale and the Kentucky Department of Corrections Categories of Offenses and Penalties, pursuant to CPP 15.2. All of these, except for the last, may be found in Mr. Taylor's article beginning at page 50.

Corrections Policy and Procedure, CPP 27-11-03(VI)A.1., provides three criteria for the inmate's **automatic exclusion** from being **considered** for this program. This applies even if the sentencing court is inclined to grant relief, and has referred the inmate request to DOC.

The trial counsel needs to know these three criteria not only for accurately advising the client, but in some cases, for formulating a strategy of damage control to preserve the client's eligibility for Prerelease Probation. In some circumstances, the advocate may want to try to secure a negotiated agreement with the Commonwealth recommending Prerelease Probation to the sentencing court after the inmate has served a definite amount of his/her sentence and maintains eligibility. However, if the client is not eligible for probation, s/he won't be eligible for Prerelease Probation either.

Criteria #1—Victim killed or sustains serious physical injury.

This applies only to the sentence(s) the inmate is serving when s/he applies for Prerelease Probation, not for past indiscretions (although it may be a factor in whether the client receives a favorable recommendation from DOC).

Obviously, in some cases, the defense advocate can do little or nothing to avoid this exclusion from eligibility. On the other hand, where this is an issue as to whether the victim suffered **serious** physical injury, seeking a written favorable finding by the court or negotiating an agreed upon finding with the prosecution **and** making that a part of the Presentence Investigation Report may keep the client's eligibility alive.

Criteria #2—Outstanding felony detainer.

If the client has an outstanding felony detainer placed against him or her, s/he will not be eligible for the program. However, the client can invoke KRS 500.110 for Kentucky Detainers and the Interstate Agreement on Detainers (KRS 440.450) for out-of-state felony detainers as a legal means to obtain a final disposition. The Department's Post-Conviction Branch has prepared self-help packets on detainers which are available at full-time DPA trial services offices and Kentucky prison law libraries.

Criteria #3—Client, as an inmate, commits a major violation.

This is perhaps the least known and most insurmountable of these criterion of exclusion. What is a major violation? Chances are, if your client has never served time in a Kentucky correctional facility, s/he will have no idea of the magnitude of this factor.

To simplify this discussion, note the Categories of Offenses and Penalties under CPP 15.2, attached. Any offenses greater than those in Categories 1 and 2 are Major Violations for purposes of excluding the client from ever being considered for prerelease probation during the services of his/her sentence. Things such as violation of mail or visiting regulations, bucking an inmate line, failure to clean bed area or pass bed area inspection, fighting, physical actions or force against another inmate **where no injury has occurred**, abusive, disrespectful or vulgar language directed toward or about an employee, visitor, or non-inmate, participating in a three-way telephone call, use of tobacco products in unauthorized areas, dismissed civil lawsuits based upon a finding that it is without merit or factually fruitless are all Major Violations.

To be convicted of a violation, the prison authorities need only present the prison adjustment committee "some evidence" of the violation. See Wolfe v. McDonnell, 418 U.S. 539 (1974). In other words, it does not take a lot. In some cases, the inmate may best try to negotiate down to a minor violation, to prevent automatic exclusion.

Unfortunately, once the inmate gets convicted of a major violation, his eligibility for Prerelease Probation on the sentence being served is terminated.

If the client is not excluded from consideration for Prerelease Probation by the court and by DOC, then

s/he must still receive a favorable recommendation from DOC before the court can grant relief. To get this recommendation several conditions must be met.

Criteria #1—Eligible for probation or shock probation.

The client must be eligible for probation on the sentence in which s/he is applying for Prerelease Probation. Eligibility for probation is outlined in KRS 533.060 and shock probation eligibility is outlined in KRS 439.265. In addition, the client must have served 180 days before being considered for Prerelease Probation.

Criteria #2—Home Placement Within Kentucky.

A fair reading would infer this requires a suitable home placement, in the eyes of the DOC. This is one area where some indigent inmates, in anticipation of seeking Prerelease Probation, may need the support of friends and family or local social services agencies, such as halfway houses as discussed in the statute.

Criteria #3—Low Category score on DOC Prerelease Probation Risk Assessment Scale.

The defense advocate is urged to review this risk assessment scale with the client who would otherwise be eligible for Prerelease Probation. In many cases, the client will be able to provide the attorney with sufficient information to determine whether s/he will fall into the low risk score category. No low risk score, no Prerelease Probation. Moreover, the score is neither appealable nor grievable. (CPP 27-11-02, VI(B)(5)). Therefore, the advocate should pay close attention when addressing the PSI contents and seeking clarification or perhaps seeking expungement of juvenile records.

The power of the PSI is overwhelming in regards to the Risk Assessment Scale. For example, your client was stopped for a traffic violation as a juvenile at age 16 and upon search of the vehicle is arrested for possession of drug paraphernalia. The charges are later dismissed via a diversion agreement but the record is not expunged. At age 29 the client is arrested and convicted of Burglary 2nd. Upon application for Prerelease Probation the client scores outside the low category of –1 to 6 because s/he is given 3 points for age at first arrest, 3 points for prior juvenile criminal history record, and 4 points for record of substance abuse as a juvenile for a total of 10 points.

All of the above information could and usually is reported on the PSI and used as errorless information by DOC. However, this incident could be avoided and the client could have a score of –1 and be an ideal candidate for a favorable recommendation if close and thorough attention is given to the PSI report.

The Risk Assessment Scale contains vague, open ended questions that leaves every client otherwise eligible for Prerelease Probation in potential danger of being given an unfair recommendation. Once again, it should be noted that the score in neither appealable nor grievable. (CPP 27-11-02, VI(B)(5)).

Even if the client receives a low score risk level, s/he still must receive a favorable recommendation from

the Deputy Warden or District Supervisor. (See CPP 27.11-02 (VI)(c)). This person reviews not only the assessment, but also the PSI and any prison programs the inmate has completed (e.g. GED, Boot Camp or Substance Abuse Program (SAP)). The decision to recommend Prerelease Probation or not is to be made within 30 days of receipt of the risk assessment score and report.

If a favorable recommendation is given to the sentencing court, it will be in the discretion of the judge whether to grant Prerelease Probation. If you are representing the client at this stage, you might point out to the court all of the necessary steps and screening your client has successfully met just to get the favorable recommendation. You can also show how easy it is **not** to get a favorable recommendation from DOC.

If DOC decides **not** to give a favorable recommendation in spite of the low risk assessment, two considerations must be recognized.

First, unlike the risk assessment score, which is explicitly not grievable nor appealable, the Deputy Warden/District Supervisor's decision apparently can be reviewed. Therefore, the client should appeal any unfavorable decision through the prison review procedures.

Secondly, CPP 27-11-02(V) specifically states DOC Policy as follows: It is the policy of Corrections that inmates who receive a low score on the risk assessment scale shall be given a favorable recommendation for Prerelease Probation to the sentencing court. In essence, this written policy should be followed by DOC except in extraordinary circumstances. It should be viewed as the rule, not the exception.

While trial defense attorneys often have many other issues and concerns to address with and on behalf of their client, it would be unfortunate to ignore the potential that Prerelease Probation may offer some clients. For some clients, as with probation, it will be a non-issue. For other clients, how the attorney negotiates and advocates for the client behind the scenes of the pending charge may prove crucial. Still, others will benefit from an understanding of what goals they must attain during their first year in prison in order to remain eligible and qualify for Prerelease Probation.

It is still too early to measure the overall impact this legislation will have on the courts, the clients, DOC and the public. It is not too early, however, for the defense advocate to arm his/her client, whenever possible, with this additional opportunity for liberty.

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Return to the Table of Contents

The Advocate, Vol. 20, No. 6 (November 1998)

New Legislation Concerning District Court Practice

Jeff Sherr
Assistant Director Education & Development

In addition to the landmark changes regarding circuit court practice, there are a number of new laws affecting district court practice enacted by the General Assembly in the 1998 session. All of the statutes listed below are already in effect. Changes are organized by topic.

Drug Testing as a Condition of Bail

Under KRS 431.520 (4) and KRS 431.525 (4), if a person's record indicates a history of drug or alcohol abuse, the court may order the person to submit to periodic testing as a condition of bail. The court may order the person to pay a fee up to the actual cost of the testing. If the person is indigent, the fee may be waived by the court. In the event of a violation, the court may change the conditions imposed or forfeit the bond in whole or in part.

Crime Victims

The definition of a "victim" under KRS 421.500 is expanded to include individuals who suffer direct or threatened physical, financial or emotional harm as a result of stalking, unlawful imprisonment, use of a minor in a sexual performance, unlawful transaction with a minor in the first degree, terroristic threatening, menacing, harassing communications, and intimidating a witness. Under subsection (6), these "victims" shall be consulted by the prosecutor on the disposition of the case including dismissal, any conditions of release, a negotiated plea and entry into a pretrial diversion.

KRS 346.060 is amended to five years after the occurrence of criminally injurious conduct for a victim to enter a claim under KRS 346.050.

Under KRS Chapter 532, restitution shall be a part of pretrial diversion, probation, shock probation, conditional discharge of other alternative sentences. Restitution may not be waived by the court. The court shall not release the defendant from probation until restitution has been paid in full even if this exceed two years. KRS 533.020 (4). KRS 533.030 (3) is amended to allow clerks to assess a 5% fee on the restitution paid.

Hate Crimes

A new section of KRS Chapter 525 is created regarding hate crimes. Menacing, criminal use of noxious substance, criminal possession of noxious substance, unlawful assembly, disorderly conduct, harassment and sodomy in the fourth degree join a number of felony offenses as crimes which may be found by the judge to be hate crimes. The judge shall determine by a preponderance of the evidence if the person intentionally committed the underlying offense because of race, color, religion, sexual orientation, or national origin. Such a finding may be utilized as the sole factor for denying probation, shock probation, conditional discharge or other form of non-imposition of a sentence of incarceration.

New Misdemeanor Offenses

Attempting to Elude is raised to a Class B misdemeanor. It is a Class A misdemeanor if the person was fleeing the commission of a felony offense and is charged and convicted of that felony. KRS 189.990 (19).

Criminal Gang Recruitment is created under KRS Chapter 506 for soliciting or enticing another person to join a gang, or intimidating or threatening another person because the other person: (a) refuses to join a criminal gang; (b) has withdrawn from a criminal gang: or (c) refuses to submit to a demand made by a criminal gang. This is a Class A misdemeanor for the first offense, and a Class D felony for subsequent offenses. "Criminal gang activity" is defined as a group of five or more persons having four or more of the following (a) self-proclamation; (b) a common name: (c) common identifying hand or body signs or signals; (d) a common identifying mode, style, or color of dress; (e) an identifying tattoo or body marking; (f) an organizational structure, overt or covert; (g) a de facto claim of territory or jurisdiction; or (h) an initiation ritual.

Fleeing or Evading Police in the Second Degree replaces KRS 520.100 (formerly Resisting an Order to Stop Vehicle). A person is guilty of this offense when while operating a motor vehicle with intent to elude or flee, the person knowingly or wantonly disobeys a recognized direction to stop his vehicle, given by a person recognized to be a peace officer. This offense is a Class A misdemeanor.

Hunting under the Influence is added to KRS Chapter 150. "A person shall not take or attempt to take wildlife with a firearm, bow, or crossbow, if the person is manifestly under the influence of alcohol or any controlled substance, and the person: (a) may endanger himself or herself or other persons or property; or (b) is engaging in any behavior specified in subsection (1)(a) to (d) of KRS 525.060." This offense is punishable by $25-$200 fine and/or up to six months imprisonment.

Driving Under the Influence

KRS 189A.010 is amended to apply a minimum sentence of seven days for DUI in the first degree if the person has a BAC of 0.18 or higher. DUI in the third degree with a BAC of 0.18 or higher is now a Class D felony.

Theft by Deception

Under KRS Chapter 455, now a summons shall be issued before an arrest warrant in theft by deception under $100 cases, unless the issuing judge determines that based on previous offenses or charges an arrest is necessary to reasonably assure the persons appearance.

Fees

KRS 439.315 (2)(b) is amended to raised the maximum misdemeanor supervision fee to $500 per year.

KRS 24A. 175 (1)(c) is amended to increase district court costs to $67 to cover the increase in the victim compensation fund.

Criminal Garnishment

New sections were added to KRS Chapter 532 permitting the court to order criminal garnishment for fines, court costs, restitution, and reimbursement charges. The prosecutor may also file lien documents for moneys to be restored to a crime victim. This lien shall bear interest at the same rate as a civil judgment unless the court orders interest shall not be awarded.

Reimbursement for Cost of Incarceration

A new section was added to KRS Chapter 532 permitting the court to order a person to reimburse the local government for the cost of his incarceration and medical services received. The court shall consider the convicted person’s ability to pay all or part of the reimbursement. The court may use contempt sanctions to enforce its order.

Public Advocate Administrative Fee

The administrative fee under KRS 31.051 was raised to $50 plus a $2.50 handling fee. If this is not paid, the court’s order is subject to a civil judgment.

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Return to the Table of Contents

The Advocate, Vol. 20, No. 6 (November 1998)

Capital Case Review

Julia Pearson, Paralegal
DPA Capital Post-Conviction Branch

Julia Pearson

UNITED STATE SUPREME COURT
CERT GRANTED

Conn v. Gabbert, cert. granted
119 S.Ct. 39
(October 5, 1998)

Questions presented:

Does a prosecutor violate an attorney's rights under the Fourteenth Amendment by causing the attorney to be searched at the time his client is testifying before a grand jury?

If the answer to the first question is "yes," was such a right on the part of the attorney clearly established in March, 1994?

Strickler v. Greene, cert. granted
119 S.Ct. 40
October 5, 1998

Questions presented:

Whether the State *violated Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny.

If so, whether the State's non-disclosure of exculpatory evidence and the State's representation that its open file contained all Brady material establishes the requisite "cause" for failing to raise a Brady claim in state proceedings.

Whether petitioner was prejudiced by non-disclosure.

Calderon v. Thompson, cert. granted
118 S.Ct. 14
(August 4, 1997)

Decision below: 120 F.3d 1045 (9th Cir. 1997) (*en banc*)

Questions presented:

Can a state inmate evade the restrictions on successive habeas petitions by pursuing a claim of newly discovered evidence through a motion to recall the mandate?

Does the Ninth Circuit have jurisdiction to rehear *en banc* a motion to recall the mandate, when that motion is the functional equivalent of a request for permission to file a second habeas petition, when 28 U.S.C. §2244(b)(3) (E) expressly precludes rehearing on the denial of such a request?

Additionally, the Court requested that counsel brief the question:

Did the Ninth Circuit, sitting *en banc*, err in concluding that the three-judge panel "committed fundamental errors of law that would result in manifest injustice" sufficient to justify recalling the mandate?

Hopkins v. Reeves, cert. Granted
118 S.Ct. 30
September 29, 1997

Decision below: 102 F.3d 977 (8th Cir. 1997)

Questions presented:

The opinion of the Eighth Circuit Court of Appeals creates a direct and admitted conflict with the opinion of the Ninth Circuit Court of Appeals in *Greenwalt v. Ricketts*, 943 F.2d 1020, 1029 (9th Cir. 1991), which requires resolution.

May a federal court require a state court, in a first degree murder case being prosecuted under a traditional felony murder theory, to ignore state substantive law and instruct its guilt phase juries on lesser homicide offenses which have never been recognized as lesser included offenses of first degree felony murder, in order to satisfy this Court's ruling in *Beck v. Alabama*?

Is the rule announced by the circuit court a "new rule" under *Teague v. Lane*, 109 S.Ct. 2934 (1989)?

Hohn v. United States, cert. Granted
118 S.Ct. 361
October 31, 1997

Decision below: 99 F.3d 892 (8th Cir. 1996)

Question presented

In light of the fact that the Court of Appeals denied the petitioner's request for a Certificate of Appealability, does this Court have jurisdiction to grant certiorari, vacate, and remand this case per the suggestion of the Acting Solicitor General?

AWAITING DECISION
Calderon v. Ashmus, argued March 24, 1998
(Decided 5/26/98 118 S.Ct. 1694 -- ed.)

Decision below: 123 F.3d 1199 (9th Cir. 1997) Questions presented: Does the Eleventh Amendment bar coercive suits that seek to prevent state officials from advocating their views on disputed issues of law that will arise and be adjudicated in the regular course of habeas litigation?

Does an injunction barring one party from seeking favorable judicial rulings on disputed questions of law and procedure constitute an impermissible viewpoint-specific restraint on lawful advocacy?

KENTUCKY SUPREME COURT
***Harper v. Commonwealth*, 978 S.W.2d 311**
(September 3, 1998)

MAJORITY: Graves (writing), Stephens, Johnstone, Wintersheimer
MINORITY: Stumbo (writing), Cooper, Lambert

Eddie Harper was convicted and sentenced to death for the murder of his adopted parents. The convictions and sentence were affirmed in 1985. *Harper v. Commonwealth* (hereinafter *Harper I*), Ky., 694 S.W.2d 665 (1985). On August 28, 1986, Harper filed an RCr 11.42 motion in the circuit court, which was denied in December, 1996.

FAILURE TO HOLD AN EVIDENTIARY HEARING

On appeal, Harper argued that his claims of ineffective assistance of trial counsel could not be determined from the face of the record. The Supreme Court addressed this issue as it analyzed each of Harper's other issues.

IAC--NO INDEPENDENT MENTAL HEALTH EXPERTS

Prior to trial, Harper was evaluated at Kentucky Correctional Psychiatric Center (KCPC) by psychiatrist Pran Ravani and psychologist Dennis Wagner. Although counsel told the trial court several times that he would decide after he saw the KCPC report whether to have Harper examined by an independent expert, he chose not to do so.

At trial, both KCPC personnel testified for the defense that Harper had schizophreniform disorder, but neither testified that they felt Harper lacked substantial capacity to appreciate the criminal nature of his acts or that to conform his conduct to the requirements of the law.

Harper argued that an independent expert was necessary to assist counsel in deciding whether an insanity defense was appropriate, to aid in presenting the defense and in presenting mitigating evidence. *Harper*, slip op. at p 2, citing *Binion v. Commonwealth*, 891 S.W.2d 383 (Ky. 1995); *Ake v. Oklahoma*, 470 U.S. 68 (1985); *Hunter v. Commonwealth*, 869 S.W.2d 719 (Ky. 1994).

The court felt that the question was different. Harper had retained his trial counsel; thus, the question was not whether the trial court had the responsibility to provide an expert, but whether counsel was ineffective in failing to retain an expert to assist in preparation and presentation of his defense. Trial counsel's strategy was proper; he decided to wait on the KCPC results before determining whether he should have Harper examined by an independent expert. The KCPC report showed that Harper did suffer from a mental illness; the psychologist testified that the mental illness was present at the time of the murders; thus, counsel's decision was reasonable under the circumstances. *Harper*, *supra*, at p. 2.

FAILURE TO REQUEST FUNDS FOR AN INDEPENDENT EXPERT

Harper argued that trial counsel had several alternatives in order to obtain funds for an expert, from declaring Harper indigent to requesting funds pursuant to KRS Chapter 31. The Court said nothing in the

record indicated counsel was in-effective by failing to request funds. *Harper*, at 3.

USE OF EXPERTS TO PRESENT DEFENSE EVIDENCE

Counsel did not question Dr. Ravani regarding whether Harper met the statutory standards for competency to stand trial under KRS 504.040(1). He also did not have Harper testify during the competency hearing.

During the competency hearing, Dr. Ravani did tell the trial court that Harper met the statutory definition of competency. Because Harper testified at the competency hearing and the trial, the Supreme Court found "no benefit" from having him testify at the competency hearing also. *Id*.

The record refutes Harper's allegation that trial counsel did not use the KCPC witnesses to explain how Harper's behavior resulted in two murders. Furthermore, both Ravani and Wagner testified how Harper's mental illness related to his conduct and the problems he experienced. Other witnesses testified about Harper's mental state and behavior around the time of the murders. *Id*.

Further, the record shows that counsel presented expert and other mitigating testimony at the penalty phase. *Id*.

SUPPRESSION HEARING

During the suppression hearing, Harper testified that he could not remember whether he had been read his rights prior to giving a full confession, but that when he asked for an attorney before signing the waiver of rights form, the police told him that an attorney would only take his money and that Harper should just sign the form. He confessed not only to the police, but also to several persons at the police station and to others in telephone calls. Several Commonwealth's witnesses testified that Harper had been *Mirandized* at least twice before being questioned.

The Supreme Court was "unpersuaded" that Harper's confession was not voluntary because of his mental illness. Further, the issue was resolved on direct appeal, and apparent from the record. *Harper*, at 4, citing *Harper I*, 694 S.W.2d at 669.

PREPARATION FOR PENALTY PHASE

In his brief, Harper argued that at the time counsel was preparing nonstatutory mitigating evidence for trial, he did not consult various publications, nor did he present available evidence. The Court found "completely irrelevant" "the 'myriad of resources' available, in part because appellate counsel did not state how trial counsel could have used them. Further, counsel did present "many positive aspects" of Harper's life during the guilt phase. "[A]ll evidence introduced in the guilt phase may be considered by the jury during the sentencing phase." *Id*., citing *Moore v. Commonwealth*, 771 S.W.2d 34 (Ky. 1988).

STRICKLAND STANDARD

The Supreme Court noted that appellate courts "must be especially careful not to second-guess or condemn in hindsight the decision of defense counsel. A defense attorney must enjoy great discretion in trying a case, especially with regard to trial strategy and tactics." Although a post-conviction appellate court "might not necessarily agree with trial counsel's trial strategy and may likely have employed other tactics," in light of all the circumstances, counsel's performance was not outside the *Strickland v. Washington*, 466 U.S. 668 (1984), standard of ineffective assistance of counsel. *Harper*, at 5.

The Court noted once again that RCr 11.42 cannot be used as a vehicle to claim ineffective assistance of appellate counsel. *Id*., citing *Vunetich v. Commonwealth*, 847 S.W.2d 51 (Ky. 1992); *Commonwealth v. Wine*, 694 S.W.2d 689 (Ky. 1985).

Finally, Harper's claim that post-conviction counsel was ineffective was not preserved. The Court found no palpable error, and that the claim was thus not reviewable on appeal. *Id*., citing *Todd v. Commonwealth*, 716 S.W.2d 242 (Ky. 1986). Further, the Court found that the argument was without merit. *Id*., citing *Coleman v. Thompson*, 501 U.S. 722 (1991); *Murray v. Giarratano*, 492 U.S. 1 (1989).

DISSENT

Justice Stumbo, jointed by Justices Cooper and Lambert, wrote that the issues raised in Harper's RCr 11.42 motion on should not have been disposed of without a hearing. She found it "difficult to understand" how the Court could speculate that trial counsel's decision not to seek additional mental health experts was trial strategy without having a hearing in which counsel noted that trial strategy, not financial constraints or an assumption that the testimony of the experts would be more positive than it was the reason why no other experts were presented. With the facts presented on appeal, the Court could just as easily have found that counsel did not do a full investigation, or that counsel did not know how to present evidence in order to fully develop his case. *Harper*, at 6.

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Return to the Table of Contents

The Advocate, Vol. 20, No. 6 (November 1998)

Ten Thoughts on Technology and the Defender Advocate (Interactive)

Michael Losavio

Defender legal work is a furnace for advocacy. Extraordinary issues are often mixed in with the mundane, giving the advocate practice opportunities private civil counsel may see but rarely. Professionalism issues, such as attorney-client relations, erupt at extremes. And, of course, your sense of self is always tested in the barrage challenging why you do what you do. Don't you love it?

Accompanying this is the mind-numbing detail work of legal practice that must be done for each and every case. Especially considering who you represent, crossing every "t" and dotting every "i" can become of manifest importance in seem-ingly minor circumstances. Technology suppos-edly can help with this. Computers should help with mind- numbing work as, well, they have no minds to numb. That simple fact gives them great utility in the information world.

But for this to work, *you* have to use *your* mind. Planning for technology is crucial if you are going to try something new. And the planning you need to do is not just an analysis of technical specifications, like processor speeds or RAM capacity or hard disk size. It is an analysis of **what you do as an advocate**. Technology is just a tool, with computer technology a tool just as your pen and legal pad are tools. If it can't help you, toss it.

A rather remarkable exemplar of technology planning generally can be found at , the Web site for the Strategic Information Technology Plan for the Commonwealth of Kentucky ("SITP"). The "vision" therein for information technology for the Commonwealth includes two crucial points, that 1) the focus is on the *customer* and 2) technology should help *you* do your work better. These may seem self-evident, but technology projects are legendary for doing neither.

For you as an advocate, the stakes are more than just financial loss; life and liberty are on the line.

Given these considerations, I've tossed out ten points for both of us, you and me, to think about as to the better use technology for advocacy, whether its better use of your word processor or implementation of a state-wide case manage-ment system. Some of these points conflict with one another, but that is their nature, and mine. What do you think about technology and your legal practice? Let me know your thoughts, and responses, at talkback@losavio.net.

Thought Group One

1. You come first. You, not the machine, come first. The technology (hereinafter "techno") must provide a *net* benefit that helps you in some way. If you are tired and stressed, you suffer, your work suffers, justice suffers and your client suffers. Insist that the technology give you what you need. Insist on proof that it gives you what you need. And if you don't quite know what you need, figure that out first.

2. **Your mission comes first.** Your mission, not the machine, comes first. Did I say you came first? Hmmm? Well, putting that conflict aside for a moment, you still must insist that what the techno does conforms to and promotes your mission. Otherwise, why bother? Of course, that assumes you have a firm vision, a firm grasp of your mission. If not, and that's not unusual, then some thought on that, and discussion with your colleagues, should help you grasp that mission and measure the machine by it.

3. **Your client comes first.** Your client, not the machine, comes first. If not for the client, why are you there? Will the techno improve case representation or simply divert resources so you will have nicer-looking documents and reports? This is a key analysis you must do.

But it isn't an easy analysis. The law is an *enterprise* endeavor; it involves your client, you, your "firm," the prosecutor, the Commonwealth, the trial judge, the appellate judges, and so forth. Representing your client well means dealing with the entire enterprise of the law. Thus nicer-looking documents might be important in maintaining credibility with the court and assuring a thorough appreciation of the argument you are making, whether by the trial judge or on appeal. Clear management reports might be important for the "firm" to know that you've been given too many difficult cases at once and that relief is in order. What may seem like an irritating new task early in a case may produce tremendous benefits later; this really does require careful, considered thought.

Oh, and how can I put the client, the mission and you, the advocate, all first? Because that's where they all belong. Let me know your thoughts on reconciling this, if that's needed, at talkback@losavio.net.

Thought Group Two

4. **It's not you, it's the technology's fault.** Remember that techno would be thought treacherous if techno thought at all. With millions of transistors on Pentium computer chips and millions of lines of code in Windows 95, it's amazing they work at all. Techno must work for you and fit smoothly into your needs. When it doesn't work well, especially after you've done your part, it's the techno that's bad. Send it back!

5. **It's not rocket science, but it's not easy**. Remember French class? Learning French, or Spanish or any human language, is a lot, lot harder than learning computer applications, but with French you spent at least an hour each day for years simply to master a menu in a restaurant. Even with good techno, you have to invest significant time in training and practice. Be Patient!

6. **These are some really powerful robots, and they can do wonderful things.** After all that, please believe me when I tell you these systems can have wonderful benefits for your practice. You just have to delve into how you practice and match the robotic efficiency of techno with your needs and what you do. If you could fetch recent slip opinions on-line and save ten minutes of fumbling and searching, that ten minutes for additional reflection on the case will produce better work. Techno - Use It!

Thought Group Three

7. **Do you know your goals for your practice and the principles enunciating those goals and the parameters for achieving them?** Looping back, planning sometimes seems impossible in the practice furnace. But, again, if you are to bring together the items above in an effective manner, that planning must be done. It's tough and irritating, but so is legal practice.

The SITP for the Commonwealth set out as guiding principles for techno that 1) it support the business objectives of the Commonwealth, 2) Commonwealth business should be conducted electronically, 3) information is a strategic resource, 4) techno should be used from an enterprise perspective and 5) electronic information should be accessible but secure.

These principles hold equal applicability for you, but I would add the professional rules that bind us, including the ethical rules and responsibilities governing us. Articulating these principles is difficult and time consuming, but it assures important issues aren't ignored until it's too late.

8. **Have you set out objectives in your practice that are objectives for techno?** Again, the SITP can be useful for your consideration of techno objectives. One of its first objectives is to "Assess business processes for effectiveness before applying [techno] solutions.", or, in other words, assess how you practice. Other main objectives are to promote electronic communication and business transactions. Do you think these are reasonable for what you do? Have you thought about this before?

9. **What strategies will accomplish these objectives?** The strategies for accomplishing the objectives that serve the principles that enunciate the vision are the hard grunt work of implementation. Strategies can dissolve into an unrealistic morass, like swallowing a spider to catch a fly, but, properly implemented, are the best way to minimize risk and assure success. When you have time, you plan your case strategy; so, too, should you strategize techno.

Be specific. Think about what you need done and look at techno options. If you're tired of telephone tag trying to consult on a case, will electronic mail help? Will an electronic brief bank help you? Would voice recognition software make it easier to do discovery inventories? Would standard introductory client letters reduce client anxiety about what going to happen with their case and what is expected of them? Would a WWW tool-belt give you quicker access to judges'; phone numbers and clerks'; fax numbers from home or on the road?

10. **Are you committed?** We are talking about new ways of doing old things. Even if we conclude these are better ways, they are different ways, and it always takes time to learn the new and different. Since most of what we do involves mission-critical use of information (in other words, mistakes are not allowed) this new learning can be even more stressful during transition. Planning means learning about what we could do better and then learning to do it better. It takes a lot of time and commitment to making the system work, before and after techno is involved. It involves pain, because you will tell people that the way they've always done it is not the best, and people can bitterly resent that.

If you think things could be better, make the commitment. Techno gives you a chance to leverage your skills and knowledge. Look at what's planned for the DPA web page (http://www.dpa.state.ky.us), and you can see the possibilities. The web page for the U.S. District Court in Louisville (is a toolbox for the federal practitioner. The AOC web site (http://www.aoc.state.ky.us) tells those before the court what, in fact, the courts do and how they act, clarifying some of the worries our clients have about what is going to happen to them. These are strategies that, carried out and maintained, can make a difference.

In Conclusion

These thoughts, in truth, are not clear to me. We tend not to think of justice as an enterprise but as a collection of units collaborating here and there. There are good historical and policy reasons for that. But putting technology to work for us requires we revisit those reasons, and the current system they produced. Even if you are planning to buy that Christmas Super -Pentium with Mega-RAM, a monster monitor, magic sound, etc..., first ask "Why?" At the least it may save you a few dollars, and perhaps it will be the foundation for better use of these tools in your work of justice.

And this is interactive. Let me know your thoughts, and responses, at talkback@losavio.net.

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> The weak can never forgive. Forgiveness is the attribute of the strong.
>
> - Mahatma Gandhi

Return to the Table of Contents

The Advocate, Vol. 20, No. 6 (November 1998)

Plain View

Ernie Lewis, Public Advocate

***County of Sacramento v. Lewis*,**
118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998)

The United States Supreme Court has held that the Fourth Amendment does not apply in the context of a civil suit seeking damages for death resulting from a high speed chase.

Lewis was a passenger on a motorcycle being chased by the police. At the end of the accident, Lewis was thrown off the motorcycle and struck by the police, causing his death. His parents and estate sued the police and the county government under 42 U.S.C. #1983, alleging a deprivation of his Fourteenth Amendment rights. The District Court granted a summary judgment to Sacramento, holding that Sheriff Smith had qualified immunity from the suit. The Ninth Circuit reversed, holding that there was an issue of fact making a summary judgment inappropriate, and further holding that the proper standard for such a suit was the "'deliberate indifference to, or reckless disregard for, a person's right to life and personal security.'"

The U.S. Supreme Court reversed the Ninth Circuit. In an opinion written by Justice Souter, the Court held that a police officer does not violate the Fourteenth Amendment rights of a motorist by causing his death through deliberate indifference to, or reckless disregard for the motorist's right to life and personal security.

In reaching its holding, the Court addressed whether the officer had violated Lewis' Fourth Amendment rights. Had the Fourth Amendment applied, then the standard would have been the Fourth Amendment's reasonableness standard rather than the more rigorous standard under the Fourteenth Amendment. The Court found that the Fourth Amendment did not apply in the context of a high speed chase. The Court relied upon *California v. Hodari*, 499 U.S. 621 (1991) which held that "a police pursuit in attempting to seize a person does not amount to a 'seizure' within the meaning of the Fourth Amendment." The Court further relied upon *Brower v. County of Inyo*, 489 U.S. 593 (1989), which stated that "'a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an

individual's freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally *desired* termination of an individual's freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement *through means intentionally applied'*."

The Court went on to evaluate the case from the substantive due process standard established in *Rochin v. California*, 342 U.S. 165 (1952), that is whether the actions of the police in this case had been so arbitrary to have shocked the conscience. Using this standard, the Court resolved the case by holding that "high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressible by an action under #1983."

United States v. Huguenin,
154 F.3d 547 (1998)

The Sixth Circuit has found wanting the seizure of drugs which occurred at a checkpoint on Interstate 40 in Tennessee. In doing so, they also issued an important decision explaining what constitutes both a constitutional and an unconstitutional sobriety checkpoint.

In this case, two people were driving on I-40 when they saw a sign saying "Drug - DUI Enforcement Check Point ½ Mile Ahead." Huguenin and William Martin pulled off the highway at the next exit, which was 150-200 yards after the sign. At the end of the exit ramp, not visible from the highway, sat the checkpoint conducted by the Roane County Sheriff's Department. Officer Brock noted out-of-state license tags on the car, and asked them why they had gotten off the highway. Martin replied they had left the highway in order to gas up their car, which was belied by a full gas tank. Brock did not notice any evidence of Martin's intoxication whatsoever.

Officer Worley then took over. He noticed that Martin was not looking at him, gripping the steering wheel, and that the passenger, Ms. Huguenin, was shaking. Worley accused Martin of lying regarding why he had left the highway, and asked to search the van, a request which was refused. Worley brought King the dog, who alerted to the back of the van. Worley opened the van and found 265 pounds of marijuana.

The defendants filed a motion to suppress but lost in the federal district court. They entered a conditional guilty plea, and appealed to the Sixth Circuit.

In a 2-1 opinion written by Judge Contie and joined by Judge Moore, the Sixth Circuit reversed. The Court noted that the defendants had been seized for Fourth Amendment purposes when they were subject to detention at the checkpoint. *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990). The constitutionality of checkpoints is to be determined by making a reasonableness analysis using the balancing test established in *Brown v. Texas*, 443 U.S. 47 (1979).

The checkpoint in this case failed to meet the constitutional boundaries established in *Brown*. The Court

found that the checkpoint in this case was one primarily set up to detect narcotics rather than intoxicated drivers. The checkpoint here was a mixed-purpose checkpoint, with narcotics detection being the primary purpose, and intoxicated drivers being the secondary purpose. The intoxicated driver purpose, indeed, was viewed as a pretext for conducting searches for narcotics. Such a pretextual checkpoint "has pitfalls that come perilously close to permitting unfettered government intrusion on the privacy interests of all motorists."

Because the primary purpose of the checkpoint was one of checking for narcotics, under *Brown* this interest did not outweigh the "severity of the interference with individual liberty…"

The Court held that "without a traffic violation or reasonable suspicion of drug trafficking, it was a violation of the Fourth Amendment for the police to selectively detain motorists with out-of-state tags who took the Airport Road exit to question them about their travel plans in order to assess whether they were engaged in drug trafficking. Rather than establishing a neutral procedure applicable to all motorists, the officers set up a trap aimed at motorists who took the Airport Road exit, a trap which they believed then gave them the right to ask intrusive and harassing questions about travel plans. We believe this pretextual seizure invokes the 'kind of standardless and unconstrained discretion [that] is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent.'"

Judge Kennedy filed a dissenting opinion. He believed that "the District Court's finding that the checkpoint was a mixed-motive checkpoint, established for the dual purpose of intercepting both drunk drivers and drug traffickers, is not clearly erroneous, and that such mixed-motive checkpoints are permissible…[W]here the state has one lawful purpose sufficient to justify a roadblock, that the state also uses the roadblock to intercept illegal drugs does not render the roadblock unconstitutional."

Short View

1. *State v. Young*, 957 P.2d 681 (Wash Sup. Ct. 6/11/98). The Washington Supreme Court has decided that a show of authority, rather than submission to authority, is sufficient to constitute an arrest under the Washington Constitution. By doing so, the Court rejects the submission to authority test of *California v. Hodari D* , 499 U.S. 621 (1991). The Washington Court was interpreting a state constitutional provision stating that "'No person shall be disturbed in his private affairs…without authority of law." This language, as opposed to the "seizure" language of the U.S. Constitution, led the Court to a different interpretation of when an arrest occurs.
2. "In Partial Praise of *Boyd*: The Grand Jury as Catalyst for Fourth Amendment Change," 25 Search and Seizure Law Report No. 5 (May 1998) is an interesting article by Professor Robert L. Misner. In it, he proposes that because the exclusionary rule is so ineffective, and effects so few cases, that it be abandoned altogether. In its place he sees involving the grand jury which would indict offenders of the Fourth Amendment, as well as report to the trial court for potential remedying of violations. "[T] inherent powers of the federal grand jury to indict, present and report [should] be used as a starting point to begin a common law process of evolving alternatives to the

exclusionary rule. The grant jury may indict a public official for a Fourth Amendment violation if that course is proposed by the prosecutor. An indictment, in response to official misconduct, certainly sends a deterrence message to law enforcement that is at least as strong a message as is sent by excluding evidence. If an indictment of a federal official for an unconstitutional search accompanies the indictment of the person searched, illegally seized evidence should be admitted against the searched person. If an indictment of the searched person results from a grand jury presentment, illegally seized evidence also should be admitted." Fascinating.

3. *Commonwealth v. Agosto*, 696 N.E.2d 924 (Mass. Sup. Jud. Ct. 7/21/98). Twenty-one days is too long between the seizure of a car and the search of that car to have the search justified under the probable cause exception to the warrant requirement. Because the inherent mobility of the car is the primary rationale for the exception, holding the car for 21 days before conducting the search undercuts the exigency. Thus, the failure to obtain a warrant resulted in the overturning of the conviction.
4. *State v. White*, 958 P.2d 482 (Wash. Sup. Ct. 7/16/98). The Washington Supreme Court has extended its state constitutional holding that the police may not inventory a locked trunk of a car to cars which have a trunk release. The Court relied on the prior case of *State v. Houser*, 622 P. 2d 1218 (Wash. Sup.Ct. 1980). "Whether a locked trunk is opened by a key or a latch, it is still locked. The privacy interests are the same. We hold the use of the trunk release mechanism in this case is still the warrantless search of a locked trunk…"
5. *Reittinger v. Commonwealth*, 502 S.E.2d 151 (rehearing granted 503 S.E.2d 812 9/1/98) (Va. Ct. App. 7/21/98). When a lawful traffic stop has ended, it is a violation of the Fourth Amendment to thereupon conduct a frisk, according to this opinion of the Virginia Court of Appeals.
6. *U.S. v. Albrektsen*, 151 F.3d 951 (9th Cir. 7/31/98). A police officer armed with an arrest warrant may not go into the home of the arrestee when the arrestee is standing in the doorway. The officer had knocked on the door, and desiring to search the motel room, pushed past the arrestee when he answered the knock. The Court rejected the government's position that the officer could conduct the search incident to a lawful arrest, or that the search was a protective sweep.
7. *Welshman v. Commonwealth*, 502 S.E.2d 122 (Va. Ct. App. 7/21/98). This case demonstrates how far we have veered away from the fundamental privacy principles of the Fourth Amendment. Here, the police had probable cause to arrest two people near a crack house. The suspects joined a group of people on the sidewalk. The officers ordered the group to lie down on the ground. The group was ordered to extend their hands away from their bodies. The defendant, for whom there was not even an articulable suspicion, put his hands under his body. He was frisked, and crack cocaine was found in his hands. The Court held that the seizure was permissible absent probable cause or an articulable suspicion. This holding was accomplished only by coming down hard on the side of officer safety, and failing to consider the privacy concerns of Welshman. The Court relied extensively on *Maryland v. Wilson*, 419 U.S. 508 (1997), which held that a passenger could be ordered out of a car during a traffic stop even without an articulable suspicion. The Court also considered the probable cause on the two suspects, the location, the reputation of the neighborhood, and the proximity of children nearby. Given these factors, the Court determined that the frisk was reasonable despite there being no articulable suspicion.
8. *U.S. v. Salzano*, (as amended) 158 F.3d 1107 (10th. Cir. 7/28/98). The police violated a driver's Fourth Amendment rights by detaining him for ½ hour in order to bring a narcotics dog to the

scene to sniff the defendant's motor home. The defendant had been stopped because he had gone onto the shoulder with his motor home. After being warned about driving while sleepy, the defendant declined the officer's invitation to permit his motor home to be searched. Following this refusal, the officer detained the defendant to await the narcotics dog. The Court rejected the government's position that the defendant's explanation for driving an expensive motor home, the size of the motor home, the odor of evergreen, the defendant's nervousness, and the defendant's having been in California for reasons why there was an articulable suspicion justifying the detention.

9. *State v. Jones*, 506 S.E. 499 (SC Ct. App. 5/4/98). A police officer who wants to keep the identity of an informer from a defendant violates *Franks v. Delaware*, 438 U.S. 154 (1978) by placing false information in the affidavit, and then replacing the falsehood with truthful oral statements to the magistrate.
10. *State v. Varnado*, 582 N.W.2d 886 (Minn. Sup. Ct. 8/6/98). The police may not order a lawfully detained motorist into a police car and frisk him prior to his going into the car without proving that the motorist is a threat. The Court rejected the State's argument that the police should have a blanket rule permitting them to place lawfully detained motorists into police cars following a suspicionless frisk, saying that such a rule would "eliminate any Fourth Amendment protection against unreasonable searches in traffic stops."
11. *Upshur v. U.S.*, 716 A.2d 981 (DC Ct. App. 7/30/98). The police who have seen a defendant exchange something for money in a high crime/drug neighborhood, and who have a reasonable suspicion that the defendant has committed an offense, may stop the defendant, but may not require him to open his balled-up fist without some evidence that the defendant is armed and dangerous. The Court rejected the State's argument that because drugs and guns go together, that reasonable suspicion regarding the drug transaction was sufficient to allow a *Terry* frisk for weapons. "[T]o hold that the officers were justified in grabbing appellant merely because they suspected he had exchanged money for drugs would undermine the *Terry* requirement that frisks be undertaken only where the officers have a reasonable articulable suspicion that the suspect may be armed and presently dangerous."

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Return to the Table of Contents

The Advocate, Vol. 20, No. 6 (November 1998)

West's Review

Julie Namkin

Julie Namkin, Assistant Public Advocate
Appellate Branch

Brown v. Commonwealth
975 S.W. 2d 922 (KY 9/3/98)
Jefferson Circuit Court

Brown was charged with intentional or wanton murder. The jury was instructed on wanton murder, second degree manslaughter and reckless homicide. Brown objected to the wanton murder instruction on the ground that the Commonwealth failed to prove the element of extreme indifference to human life. Brown was convicted of wanton murder and sentenced to twenty years imprisonment.

On appeal, Brown challenged the constitutionality of the wanton murder statute. Although Brown couched his argument in terms of a separation of powers question, the Kentucky Supreme Court believed the true issue was whether the wanton murder statute was void for vagueness. The Court concluded it was not. Upholding the constitutionality of the statute, the Court stated the phrase "extreme indifference to human life" are words of common understanding, and the Commentary to the Penal Code sufficiently sets forth the type of conduct that will sustain a wanton murder conviction.

Brown's conviction was affirmed.

Houston v. Commonwealth,
975 S.W.2d 925 (KY 9/3/98)
Fayette Circuit Court

Houston was convicted of various drug related offenses and being a persistent felony offender. He was sentenced to twenty-four years imprisonment. Houston raised the following issues on appeal.

First, the Commonwealth sought to enhance Houston's conviction for trafficking in cocaine from a class C felony to a class B felony on the ground that Houston was in possession of a firearm at the time of the drug offense. See KRS 218A.992. Houston claimed the court should have granted his directed verdict motion on the possession of a firearm charge because he did not have actual physical possession of a firearm. The Kentucky Supreme Court disagreed and held that a drug violation penalty may be enhanced under KRS 218A.992 if the violator has constructive possession of a firearm. To the extent that *Powell v. Commonwealth*, Ky.App., 843 S.W.2d 908 (1992), requires actual physical possession of the contraband

for the purposes of KRS Chapter 218A, it is overruled. In Houston's case, the police found three firearms in the apartment where Houston was staying, but none on Houston's person. The guns were apparently in plain view and easily accessible.

Second, Houston argued the trial court erred when it failed to give his requested instruction on criminal facilitation. The Kentucky Supreme Court disagreed. The Court reasoned that criminal facilitation is not a lesser included offense of trafficking in or possession of a controlled substance because it requires proof not of the same or less than all the facts required to prove trafficking in or possession of a controlled substance, but proof of additional and completely different facts. The offense of criminal facilitation requires proof that someone other than the defendant committed the object offense and the defendant, knowing that such person was committing or intended to commit that offense, provided that person with the means or opportunity to do so. KRS 506.080(1). The Court noted that the only Kentucky case holding that criminal facilitation is a lesser included offense of trafficking in a controlled substance is *Farris v. Commonwealth*, Ky.App., 836 S.W.2d 451 (1992), and since it contains no analysis, cites inapplicable authority, and is contrary to existing precedent interpreting KRS 505.020(2), it is overruled. Thus, since Houston was not entitled to an instruction on criminal facilitation, there was no error by the trial court.

Houston's convictions were affirmed.

Samples v. Commonwealth
(Ky. 9/3/98)
983 S.W. 2d 151
(as modified on rehearing 12/17/98)
Jefferson Circuit Court

Samples was indicted for committing numerous sexual offenses against his three step-children. He was convicted of first degree sodomy, second degree sodomy and first degree sexual abuse, all involving the same victim. Samples waived jury sentencing and the trial court sentenced him to twenty-two years, ten years and five years, respectively, all to run concurrently. Samples raised three issues on appeal.

First, Samples argued the trial court erred when it refused to give him access to the addresses of prospective jurors for voir dire purposes when the addresses had been "blacked out" on the juror qualification forms. The trial court had refused to give Samples this information based on an action by the Chief Circuit Judge which had been approved by the Chief Justice of the Kentucky Supreme Court.

The Kentucky Supreme Court phrased the issue as whether the trial court's order denying access to juror addresses on the qualification forms conflicts with the rules governing voir dire. The Court concluded that since KRS 29A.070(7) Specifically authorizes the court to limit access to the forms in the interest of justice, the Chief Circuit Judge's order is not inconsistent with the statute. As such, the trial court properly deferred to the Chief Circuit Judge's order, and the denial of appellant's motion was also proper.

Second, Samples objected to the prosecutor telling the prospective jurors in voir dire that Samples faced a penalty from one day to life in prison. Samples claimed the comment was inaccurate because the minimum penalty for the charges in the indictment was one year and not one day. The trial court overruled the objection because with the potential for instructions on lesser included offenses, the prosecutor's statement was not a misrepresentation of the possible range of punishments.

On appeal, the Kentucky Supreme Court held that [w]hile the [prosecutor's] voir dire question bordered on exaggeration and tended toward trivialization, there was no direct misrepresentation of the permissible range of punishment," especially since "the jury was ultimately instructed on the misdemeanor offense of second degree unlawful imprisonment.

Third, Samples complained about the improper admission of bad character evidence. During the trial, Samples introduced testimony by a social worker that several of the children's allegations about him were not recorded in her CHR reports. The purpose of this testimony was to attack the children's credibility by showing recent fabrication. While cross-examining the social worker, the prosecutor elicited that she had interviewed Samples as part of her investigation and that Samples had threatened her. Defense counsel's objection was overruled. The social worker then testified that Samples told her that if anyone removed his children he would kill 'em.

The Kentucky Supreme Court pointed out that the child victims claimed that Samples had threatened their lives and the lives of others to prevent them from telling anyone that Samples had forced them to engage in sexual activity with him. Thus, since Samples' threat to the social worker tended to support the victims' credibility regarding Samples' death threats, the admission of the social worker's testimony was within the trial court's discretion.

Samples' convictions were affirmed.

Neace v. Commonwealth
978 S.W. 2d 319 (KY 9/3/98)
Breathitt Circuit Court

Neace was tried and convicted of first degree sodomy and sentenced to twenty years in the penitentiary.

After finding Neace guilty of the charged offense, the trial court instructed the jury to fix Neace's punishment At confinement in the penitentiary for twenty years or more, or for life, in your discretion. The jury returned with a question expressing confusion about "why there was a minimum and a maximum" sentence. Defense counsel suggested the instructions be reread to the jury and the Commonwealth and the court agreed. The court made no effort to answer the jury's question. In fact, it told the jury no further comment could be made on the instructions.

After further deliberation, the jury returned with a five year sentence. The court asked counsel if they had anything to say. The Commonwealth said it didn't, and the defense attorney's comment was inaudible.

The court dismissed the jury. The Commonwealth then moved the court to disregard the jury's sentence and to fix Neace's sentence at the minimum of twenty years. Defense counsel objected, but the court imposed a twenty year sentence.

On appeal, defense counsel argued the trial court had no authority to set aside the jury's sentence and impose a twenty year sentence upon Neace.

The Kentucky Supreme Court stated [i]t would have been better practice for the trial court to have ordered the jury into further deliberations with directions to re-read the instructions and return a verdict consistent therewith. The Court further stated that since the jury's five year sentence was not within the range set out in the sentencing statute, it was unauthorized and unlawful. An unlawful sentence must be corrected to conform to the law. See *Skiles v. Commonwealth,* Ky.App., 757 S.W.2d 212, 215 (1988), holding that a trial court can correct an unlawful sentence at any time. Thus, Court held that the jury's sentencing recommendation fell outside the required statutory range, and the trial court properly corrected the sentence to conform to the law.

Neace's conviction was affirmed.

Bennett v. Commonwealth
978 S.W.2d 322 (KY 9/3/98)
Scott Circuit Court

Bennett was convicted of wanton murder and complicity to first degree robbery. He was sentenced to forty years and twenty years, respectively, to run concurrently. He raised three issues on appeal.

First, Bennett claimed the trial court erred in failing to grant his change of venue motion. Twelve newspaper articles were published in a six month period, but the trial did not occur until six months after the last newspaper article. Although each of the fifteen jurors seated to hear the case had heard about the crime or discussed it, none had expressed an opinion on Bennett's guilt or innocence. Two prospective jurors were challenged for cause and they were removed, and the court struck one prospective juror sua sponte because he had formed an opinion. Bennett made no showing that he was prejudiced by the pre-trial publicity particularly because Bennett admitted his participation in the robbery-murder, but relied on the defense of duress. The media publicity only informed prospective jurors of uncontested facts, most of which would be revealed to them during voir dire. Thus, the Kentucky Supreme Court held the trial court did not abuse its discretion when it denied Bennett's change of venue motion.

Second, Bennett claimed it was error for the Commonwealth to introduce victim impact evidence in the guilt phase of the trial. This testimony was introduced through the victim's mother. The Kentucky Supreme Court reiterated its belief that victim impact evidence is irrelevant in the guilt phase of the trial and should be reserved for the penalty phase of a trial. However, the Court found the error was harmless because Bennett introduced substantial mitigating evidence about his own family and good character during the guilt phase of the trial (testimony from a psychologist, two ministers and a law enforcement

officer) that an isolated comment about the impact of the victim's death on one of her children did not so prejudice Bennett as to deny him a fair trial. Moreover, Bennett admitted his involvement in the crime, but relied on the defense of duress.

Third, Bennett argued it was a violation of double jeopardy principles to convict him of wanton murder and first degree robbery based on the facts and the instructions in this case. The Kentucky Supreme Court disagreed. Although the wanton murder instruction required the jury to believe beyond a reasonable doubt that Bennett participated in the robbery, the Court pointed out that Bennett never objected to the language in the instruction. Instead, after the jury returned the two guilty verdicts, counsel moved to dismiss the robbery conviction on double jeopardy grounds. The Court suggested that perhaps the wanton murder instruction should have described the wanton conduct as agreeing to participate in the commission of a theft knowing that another person would be threatened with a deadly weapon during the course of that theft, rather than as participating in the robbery.

Bennett's convictions were affirmed.

Elliott v. Commonwealth
976 S.W.2d 416 (KY 9/3/98)
Simpson Circuit Court

Elliott was charged with and convicted of reckless homicide. He was sentenced to one year in prison which was probated upon the condition that he serve 120 days in the county jail.

The facts giving rise to Elliott's conviction are as follows. The victim, Gary Barker, had been drinking since three or four o'clock in the afternoon, and in the evening attended a dance at which Elliott was working. Elliott and Barker were relatives and Elliott had known Barker his whole life and had always gotten along with him. When the dance ended and it was time to depart, Barker repeatedly stated he did not want to leave. Elliott walked Barker out to the parking lot where Barker's wife was waiting for him. Upon arriving at his wife's car, Barker swung at Elliott and struck him in the forehead with a bag containing a can of beer. Elliott struck back and hit Barker in the jaw with his fist, knocking him to the ground. When Barker attempted to get up, Elliott kicked him in the chest. "There was evidence that [Elliott] then stomped Barker, kicked him in the head, and otherwise beat him to an extent in excess of that necessary for his own self-protection." Although Barker seemed alright when he got home, he fell out of bed during the night. His wife got him back into bed in the morning, but by lunchtime he had again fallen out of bed and by this time was unconscious. Barker died the next day, and the medical examiner testified the cause of death was the result of a blow to the head and could not have been the result of a fall.

At trial Elliott testified he struck Barker in self-defense, but denied stomping and kicking him. However, relying on *Shannon v. Commonwealth*, Ky., 767 S.W.2d 548 (1988), [*Shannon, Part II* held that since self-defense is an intentional act, it cannot be a defense to an unintentional crime such as reckless homicide], the trial court refused to instruct the jury on Elliott's defense of self-defense. The sole issue

on appeal was the trial court's failure to instruct the jury on the defense of self-protection.

Relying on precedent, the Court of Appeals affirmed Elliott's conviction in a 2-1 decision. The Kentucky Supreme Court granted discretionary review.

The Kentucky Supreme Court concluded "that the statutory analysis set forth in *Shannon, Part II,* was fundamentally flawed," and it overruled the same, and reinstated the holdings set forth in *Thompson v. Commonwealth*, Ky., 652 S.W.2d 78 (1983) and *Kohlheim v. Commonwealth*, Ky.App., 618 S.W.2d 591 (1981). The Court also overruled *Holbrook v. Commonwealth*, Ky., 813 S.W.2d 811 (1991), *Barbour v. Commonwealth*, Ky., 824 S.W.2d 861 (1992), *Sizemore v. Commonwealth*, Ky., 844 S.W.2d 397 (1992) and *McGinnis v. Commonwealth*, Ky., 875 S.W.2d 518 (1994), to the extent that they relied on *Shannon, supra*. The Court also overruled "that portion of *McGinnis,* which holds that an assertion of self-defense or another KRS Chapter 503 justification precludes an instruction on wanton murder as an alternative to intentional murder."

Elliott's conviction was reversed and remanded for a new trial at which, if the evidence is the same, he shall be entitled to an instruction on self-protection.

Shelton v. Commonwealth
992 S.W.2d. 849 (KY Ct. App. 8/28/98)
Knox Circuit Court

Sixteen year old Doris Shelton was indicted for murder and first degree robbery. Her case was transferred from the juvenile division of district court to circuit court where she pled guilty to first degree manslaughter and theft over $300.00. She was sentenced to fifteen years and two and one half years, respectively, to run concurrently. As a youthful offender, Shelton was sent to a juvenile facility until her eighteenth birthday at which time she was returned to Knox Circuit Court for resentencing.

At her resentencing, Shelton asked the circuit court to find that she was a domestic violence victim pursuant to KRS 533.060 so as to make her eligible for the exception to the fifty percent rule in KRS 439.3401(4). The circuit court held Shelton did not qualify as a domestic violence victim and Shelton appealed the court's ruling.

Shelton's argument, both in the circuit court and on appeal, was based on the fact that on the morning of the day on which she committed the murder and robbery, she had argued with and been thrown out of the house by her mother's live-in boyfriend (who was not the murder and robbery victim). Shelton argued that the violent encounter with her mother's boyfriend caused her to commit the murder and robbery while acting under extreme emotional disturbance. Thus she was a victim of domestic violence "with regard to" the murder and the robbery.

The Kentucky Court of Appeals disagreed. It held that KRS 533.060 and KRS 439.3401(4) "provide leniency for the domestic violence victim who strikes back at the abuser .... They do not, however, afford

that leniency to a victim who takes action against a third party" as Shelton did.

Shelton presented an additional argument on appeal, not made in the circuit court, that she was also a victim of domestic violence by the murder and robbery victim. Shelton claimed she had been having a sexual relationship with her victim and her occasional work for him as a housekeeper made them an "unmarried couple" pursuant to KRS 403.720. She also argued the victim had raped and sexually abused her.

The Court of Appeals pointed out that Shelton had made a contradictory argument in the circuit court where she had admitted that although she had been victimized by the murder victim, it did not rise to the level of domestic abuse as defined by statute. Accordingly, the Court of Appeals refused to consider this claim.

The circuit court order denying Shelton status as a victim of domestic violence was affirmed.

Dixon v. Commonwealth
982 S.W. 2d. 222
(Ky. Ct. App. 9/11/98)
Rowan Circuit Court

Dixon was arrested on November 18, 1996, for operating a motor vehicle while his license had been suspended for driving under the influence, third offense, in violation of KRS 189A.090. In December, 1996, Dixon was indicted for the charged offense.

Dixon's driver's license had been suspended in 1994, pursuant to KRS 189A.070, for a period of twelve months until October 31, 1995. Dixon moved to dismiss the indictment because his period of suspension ended on October 31, 1995, and thus he could not be convicted of operating a motor vehicle on a suspended license. Dixon's motion was denied and Dixon entered a conditional guilty plea, reserving the right to appeal the issue raised by him in his motion to dismiss.

KRS 189A.070(3) requires an individual whose license has been suspended pursuant to the DUI statute to complete an alcohol or substance abuse program so as to become eligible for license reinstatement. Dixon admitted he had not enrolled in the required alcohol or substance abuse treatment program, so that on the date of his arrest, November 18, 1996, he was not yet eligible for license reinstatement. However, Dixon argued that at the time of his arrest his license was no longer suspended, under KRS 189A.090, because the suspension period had ended on October 31, 1995. Thus, since he was eligible at the time of

his arrest to obtain his license by attending an alcohol abuse treatment program, he should have been charged under KRS 186.620(2) (a class B misdemeanor), rather than under KRS 189A.090 (a class D felony).

The Kentucky Court of Appeals agreed with Dixon. The Court stated that "KRS 189A.070 provides for a specific license suspension period depending upon the number of violations of KRS 189A.010. Once the suspension period has expired, one whose license had been suspended can reapply for his driving privileges once he has complied with KRS 189A.070(3), by completing an alcohol abuse education program." After Dixon's twelve month period of suspension had expired, his failure to attend the alcohol abuse program became the reason his license remained suspended. Thus, Dixon should not be prosecuted under KRS 189A.090, when KRS 186.620(2) provides for an alternate penalty for operating a motor vehicle on a suspended license.

The Court of Appeals stated it believed the language in KRS 189A.070 creates a period of suspension which bars reinstatement, which can be followed by a period of suspension during which one can become eligible for reinstatement, thus the rule of lenity should apply. Accordingly, the criminal sanctions provided for violations of KRS 186.620(2) should apply to Dixon, rather than the criminal sanctions in KRS 189A.090.

Dixon's conviction was reversed.

Pletcher v. Commonwealth
992 S.W.2d. 852 (Ky. Ct. App. 9/25/98)
Jefferson Circuit Court

Pletcher pled guilty to third offense DUI and his license was suspended for two years pursuant to KRS 189A.070(1). Three months later, an assistant county attorney filed an information alleging that Pletcher was a habitual violator as defined in KRS 186.642(2) and asked the court to declare him ineligible to obtain a driver's license for five years from the date of his DUI conviction. The district court refused to do so based on double jeopardy principles, and alternatively that KRS 189A.070(1) (c) had repealed the penalty provisions of KRS 186.646(1) by implication.

The Commonwealth appealed to the circuit court which reversed the decision of the district court. Pletcher than moved for discretionary review which was granted by the Court of Appeals.

The Court of Appeals stated that "operation of an automobile is a privilege, not a right" and is thus "subject to reasonable regulation by the state pursuant to its police power." Also, "proceedings to revoke or suspend a license are intended not to punish, but rather to advance the compelling state interest in protecting the public by removing drunk drivers from the highways." The Court of Appeals concluded that "habitual violator proceedings involve civil rather than criminal sanctions" and thus there was no double jeopardy violation.

The Court of Appeals also rejected Peltcher's argument that KSR 189A.070(1) (c) repealed by implication KRS 186.642(2) and KRS 186.646(1). The Court of Appeals found nothing in the statutes that "precludes the concurrent running of periods of license suspension and license ineligibility."

The ruling of the Jefferson Circuit Court was affirmed.

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"It is highly frustrating to see Kentuckians fail to live up to the potential of their land and place. They have at once a passion for the past and too often have revealed a shortsighted indifference to their potential."
- Thomas D. Clark

Return to the Table of Contents

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Original Actions, Taking Action

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If you know when and why an original action is appropriate, prosecuting one is not a major undertaking. In most cases, you will be under some time constraints but often enough you will have a day or a few days to get something done. You can prepare for an original action by having some generic pleadings on disk or hard drive.

If you are appointed counsel under KRS 31.110, you will always need a motion to proceed in forma pauperis because an original action is an independent civil action brought under the Civil Rules. CR 76.42(b) does not excuse the filing fee in civil actions brought by public defenders. This standard motion can recite that you were appointed after a finding that your client was indigent and that pursuant to KRS 31.110 and 31.120 as well as RCr 3.05(2) your client is entitled to proceed in forma pauperis on the original action as well. If there is time, it is always best to have your client execute the AOC standard in forma pauperis affidavit. However, if time prevents you from doing so, remember that *West v. Commonwealth*, 887 S.W.2d 338, 341 (Ky. 1994) allows a court at least to begin proceedings in forma pauperis pending further information about the litigant’s financial status.

You will always need a statement of jurisdiction as part of your petition or memorandum. These can be prepared ahead of time with blanks to fill in or as document parts to cut and paste with your computer. But there are some things that you must be sure of before you even suggest to your client that you file an original action.

The first thing you must do is obtain a written order or at least ask the judge for one. Much of what we do in a criminal case is by oral agreement or by oral direction from the judge. But the Court of Justice is a court of written record. This means pen and ink. An order of court is not effective until it is signed by the judge and entered by the clerk. [CR 58(1); RCr 13.04]. The written order does not have to be elaborate. It can be no more than the word "overruled" scribbled on your motion, as long as it is signed by the judge and entered by the clerk. But there must be an ink signature and an entry on the court docket.

This is the reason you must ask the judge for a written order. If the judge complies, you are set to proceed. If the judge declines, the law cannot hold you responsible for her recalcitrance. You simply file your affidavit stating that the judge has orally directed something to occur or not occur, that you requested reduction of the direction to writing, and that the judge has refused to do so. The original action court will not waste time by sending a mandamus to the judge to enter an order. It will accept your statement and proceed to decision, especially if the Commonwealth does not dispute what your affidavit says.

The second important question is whether there is a downside to deciding the issue now. In many cases, the irreparable harm to your client is evident and the viability of an original action is clear. But you must still stop and think whether or not there is a downside to prosecuting an original action.

The question in all original action cases is whether a "higher" court should intervene before judgment to correct an action or inaction on the part of the "lower" court judge. It is a discretionary decision, that is, it is a judgment call by the "higher" court. Where relief is denied, the original action court simply enters a single sentence order dismissing the petition. Your client cannot be harmed by this because the order of dismissal means only that the original action court did not believe that the judge's action needed correction *at this point.* And if the original action court grants relief, it will direct the judge to do something or prohibit the judge from enforcing an order. With these two outcomes there is little potential for bad effects on the criminal case you are defending.

But if the original action court adds an opinion on the legal question presented in your case, you will certainly be bound by it at the trial level of the criminal case and may well be bound on an appeal from the final judgment. A surprising number of original actions end up as published opinions. SCr 1.030(8)(a) and SCr 1.040(5) bind the Court of Appeals, the Circuit Court, and the District courts to follow all published precedents. The policy of the Supreme Court is to leave precedent undisturbed except for compelling reasons. [*Commonwealth v. Burge*, 947 S.W.2d 805, 811 (Ky. 1996)]. If you have a question of first impression, be sure you can live with an unfavorable result. You may have to. [See *Holbrook v. Knopf*, 847 S.W.2d 52 (Ky. 1992)].

More often, danger arises from the rules of judicial and evidentiary admissions. A judicial admission is a formal act by a party during the course of a legal action the effect of which is to stop the party from arguing otherwise or introducing contrary evidence later. [*Skora-Calvert v. Watkins*, 971 S.W.2d 823, 828 (Ky.App. 1998)]. Any factual information that you put in your written pleadings or affidavits may be construed as a judicial admission, binding on you in the original action. While CR 43.04(1) and RCr 8.22 create doubt that a party can make a judicial admission that would later be binding in a criminal case, there is no doubt that any factual statements made during the original action will be considered as admissions of a party or admissions of an agent pursuant to KRE 801A(b)(1), (3), or (4). Any testimony or written statements given in an original action may be used for "Jett" impeachment of a witness. [KRE 801A(a)(1)]. They may be used as former testimony under KRE 804(b)(1) if the witness is unavailable at the criminal trial.

Another problem is the possibility that you will reveal enough confidential information in the original action that a claim of voluntary waiver under KRE 509 will arise.

These potential problems require careful thought as to whether the original action should be filed at all. If the original action is filed, you must determine in advance what you are willing to say or disclose during the course of the original action because an indiscreet revelation may come back to haunt you at the trial of the criminal case.

Commencing The Original Action

When you decide to prosecute an original action, the pleadings are relatively simple. In the appellate courts, CR 76.36 prescribes a petition which includes a memorandum. The petition identifies the parties, usually provides the statement of facts and proceedings in the lower court, explains why relief is necessary, and closes with a statement of the relief requested. In the circuit courts, no special format is prescribed so that any pleading that complies with CR 8.01(1) should be sufficient. Better practice, however, is to use the format prescribed in CR 76.36 regardless of the court in which the original action is filed.

The Petition

In the petition, you must identify the parties. The judge about whom you are complaining is always the respondent. If your client is the petitioner, the Commonwealth will be designated as a real party in interest. The caption will read petitioner versus respondent and real party in interest. Any co-defendants or intervenors in the criminal case will also be designated real parties in interest if they might be "adversely affected by the relief sought." [CR 76.36(8); CR 17.01; CR 19.01]. The wise course most of the time is to name and serve anyone who has appeared in the criminal action for any reason and then let them decide if they want to get involved in the original action.

The statement of facts can be as brief or as detailed as the claim requires. Keep in mind that the Rules of Evidence apply in original actions. [KRE 101; 1101(b)]. Thus, your recitation of facts and proceedings as the attorney for the petitioner, while sufficient to satisfy CR 11’s demand of good faith, may not be good enough to support the grant of relief. The practical reason is that the original action court does not know for sure what has happened in the lower court. You may rely on the rule that anything the adverse parties don’t deny in their responses is deemed admitted. [CR 8.04]. But counting on the other side to make your case is risky and judges always feel better if they are looking at and handling evidence, meaning certified copies of court documents, video and audio tapes, as well as affidavits of witnesses with personal knowledge of what they are saying. In an original action you want to assure the judge or court from whom you seek relief that they are getting the straight story and that there will be no claims of bad faith later on.

CR 76.36(5) precludes oral testimony in the appellate courts, but permits exhibits and affidavits. When possible, we send a certified copy of the video or audio tape record of lower court proceedings to the Court of Appeals or Supreme Court even though they are not expressly authorized by the rule. We have never had a court complain about or reject these records. In the circuit court, of course, there is no limitation of the type of evidence that can be adduced.

The advice to send substantial evidence with your petition is subject to the exigencies of your situation. If you have time, practice the case as if you are writing a summary judgment motion and load up the record. If you have only a 12-hour grace period, you will have to make compromises just to get paper before an original action court to seek a stay. The only fixed rule is that you must do the best you can

within the time allowed to you.

Historically, mandamus and prohibition were limited remedies. Mandamus could tell a judge to do something but could not tell him what to do. Prohibition could prohibit enforcement of an order but could not provide affirmative relief. Under CR 76.36 or CR 81, however, you are not asking for a mandamus or prohibition. They do not exist as causes of action in Kentucky any more. Rather, you are asking a judge to correct the action or inaction of a lower court judge under the supervisory jurisdiction of the Supreme Court which has been delegated to the Court of Appeals or Circuit Court by SCr 1.030(3) and SCr 1.040(6). The fundamental corollary of the grant of this jurisdiction is set out in *Smothers v. Lewis*, 672 S.W.2d 62, 64 (Ky. 1984): " . . . a court, once having obtained jurisdiction of a cause of action, has, as an incidental to its constitutional grant of power, inherent power to do all things necessary to the administration of justice before it."

By filing an original action, you are in essence asking the supervisor of the lower court judge to make that judge discharge her duty properly. You are not invoking the abrogated remedies of mandamus or prohibition. Therefore, nothing prevents you from asking for the equivalent of a mandatory injunction if the case demands it. The original action court will be reluctant to grant such relief, but the authority to grant it exists. The bottom line for this part of the petition is to ask for whatever you need.

Memorandum

Although CR 76.36(1)(d) indicates that a memorandum of authorities is a part of the petition, courts do not object if you file it as a separate pleading, particularly if you have several exhibits to attach. The memorandum is your explanation of why relief should be granted. The memorandum should be as detailed as possible within the time constraints you face because the memorandum and the evidence you submit with it may well be the only things that the original action court reviews before deciding the case.

Although the rules of court do not prescribe any particular format or content, *Adventist Health Systems v. Trude*, 880 S.W.2d 539, 541 (Ky. 1994), requires a clear demonstration of jurisdiction before the original action court can consider the merits of the claim.

Before an original action court can reach the merits of a petition, the petitioner must show either that the judge is acting outside his jurisdiction and that appeal is an inadequate remedy or that the judge is acting erroneously within her jurisdiction, that there is no remedy by appeal or other action and that great injustice and irreparable injury will result if the original action court does not intervene. The Supreme Court pointedly emphasized that "the requirement that the petitioner be without an adequate remedy by appeal is absolute." [p. 541].

I have never been able to make a meaningful distinction between the requirement of irreparable injury and the inadequacy of appeal or other action as a remedy. If appeal cannot make a litigant whole, the injury suffered or about to be suffered necessarily is irreparable. However, to be on the safe side, it is better to go down the *Adventist Health System* list item by item in your jurisdictional statement. When

jurisdiction is shown, the remainder of the memorandum is devoted to a showing on the merits that whatever the judge has done or refused to do is wrong and requires immediate attention. A number of different scenarios are presented in the third installment of this article to demonstrate typical methods of doing so.

Service On Opposing Parties

Every named party must be served with copies of all pleadings filed. [CR 5.03; CR 76.36(1)]. If the original action is filed in circuit court, it is not necessary to issue summonses. [*Stallard v. McDonald,* 826 S.W.2d 840, 842 (Ky.App. 1992)]. Service of the petition, memo and attachments by hand or by mail is sufficient.

Service on the Commonwealth in circuit court original actions must be made on the County Attorney, who represents the Commonwealth in District Court, and on the Commonwealth's Attorney, who represents the Commonwealth in Circuit Court. [KRS 15.725(1), (2); KRS 69.010]. They will decide who will appear for the Commonwealth.

In appellate court original actions, you must serve the Commonwealth's Attorney [KRS 69.010] and the Attorney General, who represents the Common- wealth in the appellate courts of Kentucky. [KRS 15.020]. Again, they will decide who appears. Hand delivery or mail is sufficient.

Remember also that if you allege the unconstitutionality of a statute, CR 24.03 requires notice to the attorney general regard- less of the court in which you file the original action. [*Adventist Health Systems*, p. 542]. The apparent thinking of the Supreme Court on this subject is that the attorney general is responsible for protecting the interest of the General Assembly expressed in its statutes and that the state-wide legal officer of the Commonwealth should at least be advised that a statute is under attack. Again, service by hand or by mail is sufficient.

Filing The Action

(A) Court of Appeals

Except in clear emergencies, all original actions cognizable in the Court of Appeals must be filed at the main office in Frankfort. In cases in which a single judge stay motion will be sought because of time constraints, the Chief Staff Attorney, George Geohegan, may authorize filing of all pleadings with the local judge who will hear the intermediate relief motion. Never assume that you can just contact a Court of Appeals judge and make your own appointment to be heard. Always call the main office and ask. They will work with you to meet the situation in which you find yourself.

CR 76.36(3) requires you to file the original and four copies of everything with the Court of Appeals clerk. The papers must be accompanied with the filing fee of $125.00 [CR 76.42(2)(ix)] or an adequate motion to proceed in forma pauperis.

(B) Circuit Court

Practice for circuit courts may vary because of local rules. In Jefferson County, original actions are treated as non-jury civil actions and are assigned to divisions randomly by computer. CR 3.02(1) imposes a $95.00 filing fee. You must be prepared to pay the fee or present a signed in forma pauperis order. Because original actions often require swift action, it is a good idea to inquire at the circuit court clerk's office before the need arises to see if a particular deputy clerk is assigned to handle original actions or if the clerk requires particular steps in filing an original action.

When The Original Action Is Filed

(A) Court of Appeals

The respondent and real party in interest have ten days to file a written response pursuant to CR 76.36(2). If you serve any party by mail, CR 6.05 grants three more days for the response. The case is submitted upon filing of all responses or the expiration of the time allotted. [CR 76.36(6)].

Upon submission, the clerk refers all original actions to the next available motion panel. The motion panel consists of three judges who have been summoned to the main office in Frankfort to decide mesne motions. This is a collateral duty of all Court of Appeal judges. The motion panel meets once each month, usually during the first week of the month. As noted in the section on Intermediate Relief that follows, knowledge of when the next motion panel meets is essential to a decision to seek a stay.

The three-judge motion panel will give the original action expedited consideration. The length of time for decision will depend on the nature of the action presented and the quality of the work presented by the attorneys. Do not count on getting a decision immediately after submission unless your right to relief is absolutely clear.

The panel normally will announce its decision by mail although when the occasion demands it will send a fax or direct a clerk to contact the parties by telephone.

(B) Circuit Court.

The respondent and the real party in interest have 20 days to file an answer. [CR 12.01]. The parties may submit the action for judgment on the basis of the pleadings and exhibits, as in a summary judgment or CR 12.03 motion, may take discovery, or conceivably may have a bench trial. [CR 39.02]. The two latter options are rarely chosen. The first reason is that in most cases the pleadings and exhibits provide all that is necessary to make a decision. The second reason is that there is not enough time to engage in discovery or scheduling of a bench trial unless the parties agree to stay the district court action for a sufficient period of time. You should anticipate disposing of your original action by written motion, although, in my experience, most circuit judges appreciate an informal hearing at which the attorneys and

judge may discuss the case and maybe hear a witness or two.

Disposition By The Original Action Court

(A) Court of Appeals

In almost every case, the Court of Appeals disposes of original actions by entry of an order or of an opinion and order. Pursuant to CR 76.38(1), these dispositions are "effective upon entry and filing with the clerk." There is no 20-day grace period because these dispositions are not CR 76.28 opinions.

You must be ready to act rapidly upon the decision of the Court of Appeals because any stay of lower court proceedings terminates upon final disposition of the original action. A party can ask for reconsideration in the Court of Appeals which would allow an ex parte motion for continuation of the stay. [CR 76.38(2)]. However, in over 15 years of dealing with original actions, I have never seen this attempted, probably because the odds of getting a stay continuation are poor except in cases where the Court of Appeals has grudgingly decided against the party because it was bound by precedent with which it did not agree.

(B) Circuit Court

A circuit court judgment conforming to CR 54.01 is effective upon signature and entry. [CR 58(1)]. A motion to amend or vacate the judgment pursuant to CR 59.05 may be made within ten days of entry. By operation of law under CR 62.01, a timely motion to amend or vacate stays enforcement of the judgment until the motion is disposed of. Otherwise, CR 62.01 precludes a circuit judge from staying the judgment until a notice of appeal is filed. Therefore, if you anticipate seeking amendment, you must be ready to file quickly because until the CR 59.05 motion is served and filed the adverse parties are free to rely on the judgment.

Application For Intermediate Relief

Consideration of the time frames for processing original actions in the Court of Appeals or Circuit Court shows that you should not anticipate a decision on your petition until at least 20 to 30 days after filing and service. This is not a big problem if your issue is double jeopardy, your client is out of custody on minimal bond, and the retrial date is six months away. More often, however, the irreparable injury is scheduled to happen before a decision reasonably can be expected, often before the adverse party’s response is due.

The original action court can halt proceedings in the lower court temporarily on motion by entering what is commonly called a "stay" order. But before you seek relief in the original action court, don’t overlook a possible easy solution to the problem. Ask the judge in the lower court if she will allow you a grace period to seek relief from the next higher court. Not all original actions will be vigorously objected to. Sometimes the judge and the Commonwealth would also like to have the problem cleared up before trial.

An agreement at the trial level court avoids a lot of unnecessary work and trouble. Even if the judge will not continue the case until the original action is concluded, seven days to obtain a stay are better than three days which are better than one day which is better than 12 hours. Nothing in the Civil Rules requires a request for stay in the lower court, but it can save a lot of time and worry.

(A) Court of Appeals

CR 76.36(4) explicitly authorizes "intermediate relief" in the form of a "temporary order" if the petitioner faces "immediate and irreparable injury." The rule is unclear whether the movant must show injury before expiration of ten days or before a hearing can be heard. The latter must govern because the next motion panel may not convene for a week or ten days after the response is due to be filed. This is why it is essential to call the Court of Appeals clerk's office when filing an original action. You must know when the motion panel meets after the due date for the response of the judge and the Commonwealth. You then tailor your motion according to what you learn.

There are cases in which you might have only one or two days to act before the irreparable injury occurs. For these cases, there is the informal process of getting a "single judge stay order." If the clerk's office does not have a three-judge panel to consider your stay motion, he can present the motion to any available judge. The preference is to present it to a judge in your district. The single judge stay order is effective until a three-judge panel considers and rules on the stay motion.

Keep in mind that the Court of Appeals has no authority to do anything until the original action is filed and pending. The stay order is an exception to CR 58(1) because it is an emergency order. It usually will recite that it is effective upon signature without entry.

(B) Circuit Court

The authority for stay orders in original actions is found in SCR 1.040(6), Sections 1, 2 and 109 of the Constitution, and is stated in *Smothers v. Lewis*, cited above. The Supreme Court rule delegates supervisory authority over the district court judge to the Circuit Court. As a constituent of the Court of Justice under Section 109 of the Constitution, the Circuit Court may perform any act not prohibited by the Constitution or by the Supreme Court. These two provisions, along with Section 2 of the Constitution which requires judicial intervention to redress arbitrary conduct, are the unstated premises of the *Smothers v. Lewis* rule that a circuit judge vested with jurisdiction in a case can do anything reasonably necessary to obtaining a just result.

Obtaining a stay order in circuit court is a less involved process than in the Court of Appeals. The response is not due until 20 days after service of the petition. If the irreparable injury will occur before then or before a decision on the merits is likely to be rendered, the judge can stay the lower court proceedings.

(C) Limits of the Stay Order

By definition, all stay orders are temporary. They remain in effect until disposition of the petition on its merits. Upon disposition, the stay dissolves and the attorney whose client is affected must either try to extend it under CR 76.38(2) or CR 59.05/62.01 or file a notice of appeal immediately together with a motion for intermediate relief pursuant to CR 76.33.

(D) Drafting and Arguing the Stay Motion

Usually, the stay motion is not an involved pleading. In the Court of Appeals you are required by CR 76.36 (4) to give notice to all other parties that you are seeking a stay. Although there is no explicit rule governing circuit court proceedings, fairness and courtesy compel giving the same notice to adverse parties in that court. The most apt analogy is to CR 65.03(1) which requires notice except for demonstrable emergency.

Please take careful note that you are not required to delay a hearing on a stay motion unreasonably to suit the calendars of other lawyers. You are only required to give notice. However, you should try to accommodate others when possible. At minimum, you will be expected to advise the other attorneys or parties of the time and place of any hearing that is scheduled. If you proceed ex parte, RPC 3.3(d) requires a lawyer to "inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse."

You must show immediate and irreparable harm. Most often it is sufficient to note the divergence between the day the bad event will occur in the lower court and the expected day relief can be obtained in the original action court, together with a statement that your petition and memo are incorporated by reference into the stay motion. In an absolute emergency, a judge can grant relief on an oral motion.

The decision of the judge or panel on the stay is discretionary. Certainly, the judges will try to estimate the likelihood of success on the original action itself. Judges see no reason to grant stays where it is obvious that the party asking for the stay has only a slight chance of success. However, the purpose of the stay motion is simply to preserve the subject matter of the action. This should be pointed out to the judge or panel considering the stay motion. Your stay motion must convince the panel or the judge that you have more than simply a colorable claim.

If a stay is granted, make sure that a copy is served on the respondent judge so that proceedings in the lower court will be halted. This is a small point, but it is occasionally overlooked.

If a stay is denied by the Court of Appeals, you may have the denial reviewed by the Supreme Court by filing an "all writs" application in the Supreme Court pursuant to Section 110(2)(a) of the Constitution. As interpreted in *Abernathy v. Nicholson*, 899 S.W.2d 85 (Ky. 1995), this provision gives the Supreme Court raw authority to deal with "virtually any matter" within its supervisory jurisdiction. To control the Court of Justice, the Supreme Court and the Chief Justice have authority to enter orders controlling any judicial proceeding in the Commonwealth of Kentucky. Although this application is in the nature of a

separate original action to the Supreme Court, the general argument is that the Court of Appeals has erroneously denied the stay and that your circumstances demand one. This application should follow the format prescribed in CR 76.36 to the extent possible given the time constraints and the circumstances of your case. An original and four copies must be filed with the Supreme Court together with a filing fee for original action or a motion to proceed in forma pauperis. The motion will be referred to the Chief Justice, or, if the Chief Justice is absent, to the Deputy Chief Justice or the Court as a whole. CR 76.36(4) applies in this action and requires notice to adverse parties.

If the stay is denied by a circuit court judge, you may seek review of the denial by an original action filed in the Court of Appeals. This original action will rely on the "jurisdiction by necessity" which was discussed in the first installment of this article, which arises from Sections 2 and 14 of the Constitution and which requires the Court of Justice to provide an adequate remedy for any legal injury. It would be well to cite *Abernathy v. Nicholson* to explain why the action is being prosecuted in the Court of Appeals rather than in the Supreme Court. The Supreme Court acknowledged in *Abernathy* that it has authority to intervene at any level of proceedings. However, the majority opinion of *Abernathy* also held that a party may not seek relief from the Supreme Court under the supervisory jurisdiction unless it can show that there is no other court to turn to. Together, these authorities indicate that complaints about denial of stay order by a circuit judge should be heard in the Court of Appeals first.

Keep in mind that actions seeking review of denial of stay orders are themselves original actions and therefore there is no problem about bringing them even though the disposition on the merits is still pending in the lower court. The only issue that can be raised in such applications is whether or not the respondent’s order should be stayed.

Appeal

Section 115 of the Constitution authorizes at least one appeal of right to another court from any civil or criminal action. CR 76.36(7) provides an expedited process for an appeal to the Supreme Court from denial of an original action in the Court of Appeals. An appeal from circuit court to the Court of Appeals is treated as a normal civil appeal. [CR 76.03(1)]. Therefore, it involves the prehearing conference procedure which requires filing of a statement with the Court of Appeals and which tolls the running of time for further steps in the appeal until the Court of Appeals decides how to deal with the case. [CR 76.03]. Certainly, this built in delay should be mentioned in any motion for intermediate relief pursuant to CR 76.33.

Pursuant to CR 76.36(7), a notice of appeal must be filed within 30 days of an unfavorable disposition of an original action. In practice, however, the party seeking the appeal will file the notice almost immediately so that a stay can be sought under CR 76.33.

No new in forma pauperis order should be necessary for clients proceeding under KRS Chapter 31. However, others will have to pay the filing fee required by CR 76.42(2)(a)(i) at the time the notice is filed. [CR 76.36(7)(b)]

The rule sets out an expedited briefing process with the brief for the appellant due within 30 days of the date on which the notice of appeal was filed and any responsive briefs due within 30 days thereafter. [CR 76.36(7)(c); (h)].

Counsel for real parties in interest must take special note of subsection (h) of this rule which requires attorneys for any real party in interest who has participated in the Court of Appeals to file a brief on behalf of the judge whose order is under review unless that would amount to a conflict of interest for her client.

CR 76.36(7)(d) requires an additional statement of appeal which provides the names of parties, counsel and the trial judge as well as the dates of certain steps in the proceedings. As usual in the Supreme Court, ten copies of the brief and statement shall be filed. [CR 76.36(7)(i)].

The case will be taken under submission upon the filing of responsive briefs or the expiration of time. Usually, the Supreme Court will give expedited review in original action cases.

Summary

Once the decision to file an original action is made, the chief consideration is time. Obviously, your client must have a strong legal argument before you can expect any court to interfere with the "orderly process" of litigation. Your action can be rendered moot at any time by events taking place in the lower court. This installment cannot deal with all the nuances and unusual situations that original actions have. However, this is a guide to the important steps that must be taken and the important considerations that must be made when an original action is undertaken. In the next installment, we will review the common scenarios in which original actions may be sought and the arguments that are germane in these scenarios.


Return to the Table of Contents

The Advocate, Vol. 20, No. 6 (November 1998)

Defending Juveniles Accused Of Sex Crimes

Timothy G. Arnold & Jeff Sherr

We live in a climate of increasing fear of sexual "predators." This fear has led to the General Assembly passing increasingly punitive legislation for sexual offenders and the institution of Megan's Law in Kentucky. This fear also impacts juvenile practice. What once was dismissed as innocent exploration or playing doctor, is now leading to prosecution for felony sexual offenses, commitment, and years of treatment. This article leads the reader through the three stages of the juvenile sexual offense process:

a. adjudication,
b. designation as a sexual offender, and
c. disposition.

Stage 1: Adjudication

Juvenile sexual offenses are widely varied in nature. Some offenders are merely mimicking the abuse perpetrated upon them. Other juvenile offenders are essentially indistinguishable from adult sexual offenders. Understanding the character of the crime is an important first step in determining how best to proceed. In order to do this, there are a few questions which you need to ask yourself.

A. ***Could your client commit this crime?***

This is an issue you need to deal with when you have young or immature clients accused of sexual offenses. This issue can be divided into three sub-issues. First, did your client have the physical capacity to commit the crime? Second, is your client legally capable of committing the crime? Third, is your client capable of forming the *mens rea* necessary to commit the crime?

i. **Physical Capacity**

The first issue to consider is whether your client is physically capable of committing the charged offenses. For rape charges, the issue is fairly straightforward: could a person of your client's age and maturity do what he was accused of?

For sodomy, sexual abuse, and other "deviant" sexual crimes, the issue is more complicated. Acts that would seem sexual in nature if committed by an adult may not be when committed by a young or immature child. For example, many young victims of sexual abuse will mimic acts that

were perpetrated on them. However, whether the act was done for the purpose of sexually gratifying either party is a critical issue with both sodomy and sexual abuse charges. "Deviant sexual intercourse" is defined as an "act of sexual gratification." KRS 510.010(1). "Sexual contact" is defined as act done "for the purpose of gratifying the sexual desire of either party." KRS 510.010(7). In either case, the perpetrator must intend that either he or the victim be sexually gratified by that conduct. Thus, when your client is young, immature, or mentally limited, it may be necessary to seek a pretrial evaluation to determine whether your client was able to commit the charged offenses.

ii. **Legal Capacity to Commit the Crime**

Apart from the issue of whether your client had the physical ability to commit the charged offenses (or, as the case may be, the physical ability to be gratified by them) is the issue of whether your client is legally capable of committing the offense. As with all juvenile cases, the infancy defense may be used. See Chapter 1, [Section on Infancy]. In addition, children under 12 may also argue that they were legally incapable of committing rape, sodomy, or sexual abuse. Children under 12 are presumed to be incapable of consenting to sexual acts. KRS 510.040; 510.070; 510.110. Indeed, despite statements in the commentary that rape first degree, sodomy first degree, and sexual abuse first degree charges can be committed by a person of "any" age, it is clear from other comments in the Commentary that the drafters of the criminal code did not consider juveniles under 12 to be capable of initiating sexual contact. The drafters noted in the commentary that:

> The critical ages for offenses prohibited by this chapter are 12, 14, and 16. Age 12 was chosen to protect pre-puberty victims. Sexual intercourse with a child less than 12 years of age indicates a considerable probability of aberration in the aggressor. Age 14 was chosen to protect children in the period of puberty *when the child arrives at the physical capacity to engage in intercourse*but remains seriously deficient in comprehension of the social, psychological, emotional, and even physical significance of sexuality. Kentucky Crime Commission, Commentary to KRS Chapter 510, (1974).

Clearly, the only meaning which could be given to that language is that the Kentucky Crime Commission simply didn't regard sexual intercourse by a child under the age of 12 to be a possibility. Chances are, if you do have a client under the age of 12 who is accused of a rape or sodomy offense, you will have one of the physical capacity defenses listed above, as well as a legal capacity defense.

Finally, older juveniles may also have a legal capacity defense to rape, sodomy, or sexual abuse charges. A juvenile must be at least 16 years of age to be guilty of rape second degree, sodomy second degree, or sexual abuse second degree charges. No juvenile can be guilty of rape third degree, sodomy third degree, or sexual abuse third degree. This is an important defense to

consider when reviewing the facts of your case.

iii. **Infancy Defense**

As in all juvenile cases involving a child under the age of fourteen, the infancy defense can also be used. Under common law, there is a presumption that children under the age of seven are incapable of committing a crime and a rebuttable presumption that a child seven to fourteen years of age lacks the mental capacity to be held responsible for a crime. See *Thomas v. Commonwealth*, 180 S.W.2d 656 (Ky. 1945) (Eleven year old, accused of unlawful sexual contact with five year old child, was entitled to instructions on infancy defense). This defense still may be utilized. See *In re Devon T*, 584 A.2d 1287 (Md.App., 1991) (Infancy defense can be raised in juvenile delinquency proceedings because, in light of the quasi-penal aspects of juvenile dispositions, state must prove the presence of the necessary *mens rea* in order to establish guilt). As with the above arguments, counsel may wish to attempt to hold a pretrial hearing to determine whether an adjudication is necessary.

iv. ***Did your client commit this crime?***

If your client is physically and legally capable of committing the offense with which she is charged, the next issue is whether he did, in fact, do the crime. Our legal history is replete with examples of persons who have been falsely accused of sexual misconduct. Juvenile court is subject to the same concerns. Some juvenile "victims" are actually willing participants in the crime who are now lying to cover up the extent of their involvement. Other victims are young children who are falsely accusing their siblings to "get back at them" for some perceived wrong. Still others are young children who have been manipulated – intentionally or inadvertently – into falsely accusing neighbors or loved ones by overeager social workers or police investigators. As with any sexual abuse case, investigation is important.

Under these circumstances, defending your juvenile client should be no different than defending your adult client. You should consult books and resources which explain how to defend an accusation of criminal sexual abuse. When appropriate, you will need to seek a "taint hearing" to challenge the accuracy of the victim's testimony. When such pretrial hearings are needed, you might want to ask that they be heard by a different judge than the judge who will hear the trial of the case, because you may not want the same fact-finder hearing both admissible and inadmissible evidence against your client. For other ideas about how to defend such cases, see Lewis, Erwin W., *Defending Child Sex Abuse Cases*, DPA Circuit Court Training Manual, Chapter 7 (1998); *see* also Morosco, B. Anthony, *The Prosecution and Defense of Sex Crimes*, (Matthew Bender) (1998).

Stage 2: Is Your Client A Juvenile Sexual Offender?

If your client has been found guilty of an offense, the next issue the court will address is whether your client is a "juvenile sexual offender." This is an extremely significant moment for your client. If your client is, in the parlance of the juvenile code, "declared" to be a "juvenile sexual offender," then he will be required by law to undergo two to three years of sexual offender treatment. Upon the completion of that treatment, he will have his criminal records checked every year for fifteen years to see if he has re-offended. Short of transferring your client to circuit court, commitment as a sexual offender is the harshest sanctions the juvenile court can impose.

The decision about whether your client should be declared a juvenile sexual offender comes in several stages. First, your client must be found guilty of a sexual offense. Second, your client must undergo a mental health evaluation. Finally, the court will have to decide whether to declare your client to be a juvenile sexual offender.

A. What Qualifies as a Sexual Offense?

If your client is found guilty of the following offenses, he can be labeled a juvenile sexual offender:

A. Any of Chapter 510 felony offenses – rape (any degree), sodomy (first, second, or third degree), or sexual abuse first degree.
B. Any other felony committed in conjunction with a misdemeanor described in Chapter 510;
C. Criminal attempt of Chapter 510 offenses, where the attempt charge is a felony;
D. Incest;
E. Unlawful transaction with a minor;
F. Use of minor in sexual performance.

If your client is found guilty of these offenses, and is thirteen years old or older, KRS 635.510 states that he "shall be declared" to be a sexual offender. If your client is twelve years old or less and found guilty of one of these offenses, or if your client is thirteen or older and found guilty of a misdemeanor under KRS Chapter 510, the court "may" declare your client to be a juvenile sexual offender.

As mentioned previously, being labeled a juvenile sexual offender is one of the worst things that can happen in juvenile court. For that reason, it is important for you to try to keep your client from being found guilty of one of the crimes listed above whenever possible. Particularly in cases where the defendant is young, it is possible to argue that your client's acts were not sexual in nature. In other words, you might be in a position to argue that your client is guilty of assault or harassment, not sexual abuse. Even when that defense is unlikely to succeed in court, it is still an important aspect of plea-bargaining.

B. Mental Health Evaluation

If your client is found guilty of one of the offenses listed above, he will be required to participate in a mental health evaluation. The results of this evaluation will have a significant impact on your client's future. The evaluator should determine whether your client has a mental condition, such as retardation or psychosis, which would affect his participation in the crime, or his ability to respond to treatment. Make certain that the evaluator meets the criterion in KRS 535.510(2). As with any mental health expert, make certain that they are aware of information favorable to your client. Make certain you get a copy of the evaluation before it is presented to the court. If you believe the evaluation is erroneous, you can ask for a hearing. You might also be entitled to your own expert.

C. The Hearing

The juvenile court can only declare a child to be a juvenile sexual offender if the child meets certain criterion. KRS 635.505 defines "Juvenile sexual offender" as an individual whom: - was under age 18 at time of offense

- is NOT actively psychotic

- is NOT mentally retarded - has been adjudicated guilty, pled to or convicted of a sexual offense (listed above) It is important when you are representing a juvenile to determine whether or not he is even eligible to be labeled a "juvenile sexual offender." Many juveniles that come through the courts are in fact very low functioning, possibly mentally retarded, and many have mental illnesses, such as psychosis. The DSM-IV identifies mild mental retardation as having an IQ below 70. *See also* KRS Chapter 202B.

As mentioned previously, KRS 635.510 now makes it mandatory on the juvenile court to declare a child to be a sexual offender when they are over thirteen and have committed one of the designated offenses. However, in some cases that statute would be subject to constitutional challenges. Remember, your client gave up a number of constitutional rights when he was tried as a juvenile. Ostensibly, these rights were forfeited because the state was only acting in your client's best interest. However, if your client does not stand to benefit from sexual offender treatment, than requiring him to endure that treatment would clearly not be in his best interest. This is particularly important when the mental health evaluation concludes that your client is not a sexual offender. Under those circumstances, the court may have several options, depending on the facts of the case. If the results of the evaluation cast doubt upon your client's guilt of the underlying offense, then the court may vacate the guilty plea or adjudication. Or, the court could simply find that your client is not a sexual offender. If the court does the latter, you need to make certain that your client's DJJ worker is well aware of the court's finding on that issue. For example, if your client is still being subjected to sexual offender treatment, in violation of the court's order, your client could move to have DJJ held in contempt of court.

Stage 3: Disposition, Or Why Did Your Client Commit The Crime, And What Can Be Done For Him?

After an admission or an adjudication of a sexual offense, the court will consider what the best course of treatment will be for your client. When so doing, it is important to consider alternatives to commitment as a juvenile sexual offender, such as commitment as a dependent or abused child, or probation.

The reasons why juveniles commit sex offenses are as varied as the crimes themselves. However, some factors are present in most sexual offense cases. For example, many sexual offenders have themselves been victims of abuse. Frequently, these sexual offenses are reactions to that abuse. Particularly where the juvenile offender is in the early stages of the "cycle of abuse," the court will have several options:

A. The court could commit the child to the Department of Juvenile Justice as a sexual offender. This commitment will frequently mean that the child will be placed in one of Kentucky's residential treatment centers. The sexual offender treatment programs at these centers are generally very harsh. Juvenile in such programs frequently report that staff regards them only as offenders: moral reprobates who are unlikely to successfully return to society. Particularly where the offender is very young, placement in such a program with older, experienced sexual offenders is unlikely to benefit the child or the community and may prove not to be sexual offender treatment, but sexual offender training.
B. When the child is destined to be removed from the community, a more preferable option to commitment is for the child to enter one of the state's private child care placements for sexual offenders. These placements will generally provide more treatment for victimization issues. Unlike residential treatment centers, the populations of these private placements generally will not include advanced criminals. As a result, success rates at these programs are likely to be higher. You can get your client into such a program in one of two ways. First, the court can simply commit the child directly to the facility. Second, the child could agree to enroll in and participate in such a program as a term of probation. In either case, the arrangements for placing that child with the private child care entity must be made in advance.
C. The most preferable option for the child is community based sexual offender treatment. This type of treatment is becoming available in a greater number of communities as time goes on. Community based treatment permits a child to remain at home or with a relative while receiving treatment, thereby eliminating concerns that she will be influenced by more advanced criminals. Particularly where the offender is young, this approach is a cost-effective method of dealing with the full range of issues associated with offending behavior. Generally, participation in community based treatment will be a condition of probation. Once again, arrangements for such treatment will have to be made in advance.

In many communities, the pre-disposition report will usually recommend commitment as a sexual

offender in sex offense cases. Therefore, it will be up to the attorney to do the legwork and make the arrangements necessary to give the court a meaningful alternative to that disposition. Also, remember that even where the child is committed to the Department of Juvenile Justice, they are still eligible for treatment in group homes, private childcare, or even in the community. Where they will be placed is likely to depend on the results of the sexual offender mental health assessment, and the preferences of your local Juvenile Services Specialist. Since the child has a clear right to placement in the least restrictive, the attorney will have to follow their client to ensure the most community-oriented placement available.

In the case of a juvenile sex offender, a separate disposition date will most likely work to your client's advantage so that you can explore community options. Do not forget that you are entitled to the pre-disposition report three days prior to the disposition hearing. KRS 610.100(1). Remember, a finding that your client is a sexual offender does not mean that placement in a residential facility is inevitable. The results of the evaluation may help to fashion a factual basis for placement in the community. A "treatment program" is defined in KRS 635.505 as a "**continuum of services** provided in the community and institutional settings designed to provide early intervention and treatment services for juvenile sexual offenders." Use this definition to assert your client's right to receive treatment in the setting which will be most conducive to early intervention and treatment for that child. Remember that the disposition should be the **least restrictive alternative**. This philosophy is a basis of the juvenile code. The sex offender section of the juvenile code specifically states that, based on the assessment and evaluation of the juvenile and family, DJJ shall utilize the least restrictive alternative. KRS 635.515(2).

Commitment to the Department of Juvenile Justice will last for a minimum of 2 years, if a child is declared a juvenile sexual offender. KRS 635.515. This time can be extended to 3 years maximum, but not past the juvenile's 21st birthday. Commitment for 2 to 3 years does NOT mean that a child has to remain in one placement for that entire time, though some courts have construed 635.515 to mean just that. The definition of treatment program, stated above, is an indication that a continuum of services is needed.

Conclusion

In the present climate, it is easy to assume that anyone accused of a sexual crime is a moral and sexual deviant who preys on helpless children to satisfy a perverse sexual need. Our legislature has created a system which is based on that assumption, and which provides harsh, intensive therapy designed to address those deviant sexual predators. Do not get caught up in those assumptions. Look at the individual facts of your client’s case. You are likely to find that your client is not a serial rapist. Rather, you may find

that your client is a young child trying desperately to cope in an abusive environment. Or, you may find that your client is a teenager who is experimenting in an unfamiliar arena.

You may even find that your client is not guilty of anything at all – that he or she is just a pawn in a

battle between adults. In any case, as a defense attorney you are uniquely qualified to get that perspective before the court. In the full light of the truth, the court can make decisions which do not cotton to broad or mistaken assumptions. Instead, the court can make decisions which are in the child's individual interest.

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Return to the Table of Contents

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Justice Delayed

Bill Cunningham, Circuit Judge
56th Judicial Circuit, Eddyville, Kentucky

There are approximately thirty inmates on Death Row at the Kentucky State Penitentiary in Eddyville. Several of them have been there for over a decade.

When Harold McQueen was executed in the early minutes of July 1, 1997, he became the first execution to be carried out since 1962. McQueen became the 163rd man executed at Eddyville. They ranged in age from sixteen to a gray bearded Frank Thomas who died at seventy-one.

The death march beginning with James Buckner has been comprised of seventy-nine whites and eighty-four blacks. Their offenses included 146 for murder, eleven for rape, five for armed robbery and one for aiding and abetting a rape.

Only fifty out of Kentucky's 120 counties have sent men to their death at Eddyville with Jefferson County--not surprisingly--leading the list at forty-four.

Of course our first execution in over thirty-five years engendered a lot of controversy and publicity. It also brought to the forefront once again the public debate on capital punishment. Whether we have capital punishment seems to me strictly a legislative matter.

There is another concern I have which was also a part of the McQueen debate and which I believe is the responsibility of the judiciary. The media and others may have talked about the death penalty itself; but what I heard mostly from ordinary citizens was the great concern for the long delay from the time the offense was committed and sentence imposed and the time the sentence was actually carried out. People do not understand why it took sixteen years to carry out Harold McQueen's sentence. These concerns are expressed by people who are not ardent and vengeful death penalty supporters. They are of the opinion that it is "inhumane" for a person to live under this cloud for so long. Also, of course, there are those who say that it loses its deterrent effect when the penalty is delayed for many years.

It is a well known idiom that "justice delayed is justice denied." The responsibility for the delay in carrying out death penalty sentences seems to lie with the judiciary. Quite frankly, I do not know why it takes so long. That makes it even worse when a judge cannot explain it to ordinary citizens.

As Commonwealth Attorney, I prosecuted several death penalty cases. Two of them resulted in the death penalty--both of which were reversed on appeal. The first one was reversed, and the defendant then entered a plea to a life sentence one day short of ten years from the day the offense was committed. The

second death penalty was reversed by the State Supreme Court over seven years from the date of conviction. Seven years for the first tier of appellate review to be reached.

Both of these cases were tried within one year of the time of the crime. It would seem to me that it should not take any longer for the Appellate Court to review a death penalty sentence than it does for prosecutors, defense lawyers, judges and juries to come together, put forth the evidence, and try the case.

We have a hard working, competent and very capable appellate judiciary in this state. And I am sure that there are very good reasons for this extended delay. Unfortunately, however, the general public and even the trial judges are not being adequately informed as to the reasons for these long delays. I believe that it would serve a very worthwhile purpose and enhance the image of the judiciary with the public if the judiciary took a lead in educating our citizens as to the reason for this delay.

When a trial judge is asked by a private citizen, and more especially the victims of a crime, why it takes seven years for the first appellate decision to be made, and that trial judge cannot answer that question, our court system suffers in the eyes of the public. We all suffer because of it.


Return to the Table of Contents

The Advocate, Vol. 20, No. 6 (November 1998)

An Explanation of the Delay in the Capital Appellate Process

Judge J. William Graves, Supreme Court of Kentucky
Paducah, Kentucky

Circuit Judge Bill Cunningham of the 56th Judicial Circuit in his article "Justice Delayed" questioned the lengthy delay between the time a death sentence is imposed and the time it is carried out in capital cases. This article appeared in the September 1, 1997, issue of *Benchmarks*, the newsletter of the Circuit Judges' Association. Judge Cunningham particularly addressed the sixteen years between Harold McQueen's sentence and execution. The delay in capital cases, however, does not solely lie in the fault of the state appellate courts, but in the finality of a death sentence and the necessity of numerous tiers of judicial review to ensure the absence of error in the process. The American Bar Association Task Force on Habeas Reform stated that some delay in capital cases is "indispensable for a thorough consideration of the issues." therefore, delayed justice due to a thorough review of each capital case is necessary to ensure justice is served.

An examination of the appellate process in capital cases reveals the tiers of appeals and, therefore, indispensable delays in processing a capital case. A capital case originates in State Circuit Court where the defendant is convicted and sentenced to death by a jury. The first stage of appeals begins with a direct appeal to the Kentucky Supreme Court examining the events of the trial for errors. Ordinarily, as in McQueen's Case, if the Kentucky Supreme Court affirms the trial court, the condemned defendant requests a review of his case by the United States Supreme Court through one of two procedures: appeal or petition for certiorari. An appeal is available if a federal claim is raised that involves a constitutional issue.

Certiorari review is at the discretion of the United States Supreme Court, and may involve any preserved federal claim.

Denial of review by the United States Supreme Court generates the next stage of appeals. This second level involves a collateral attack, appealing not the merits of the case but the integrity of the case, such as ineffective counsel. These appeals originate in the State Circuit Court. They next proceed to the Kentucky Supreme Court and, as above, to attempted review by the United States Supreme Court.

The last stage of appeals includes various claims that the death row inmate's conviction or sentence violates the Constitution of the United States in habeas corpus proceedings. Petitions for writs of habeas corpus originate in the lower federal courts. Under a habeas corpus petition in a United States District

Court, there can be a potential re-determination of the petitioner's entire case by a federal judge as long as the claims have previously been presented to the state courts. Writs of habeas corpus are not to determine one's guilt or innocence, but to determine whether a defendant has been denied a constitutional right. These appeals are often extremely time consuming, ordinarily proceeding through three levels of the federal court system: first the United States District Court; following denial in District Court they are appealed to the United States Circuit Court of Appeals; and finally to the United States Supreme Court. McQueen filed three habeas corpus petitions that remained in the Federal Court system from 1991 until 1997.

Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit admits that one of his fellow federal appellate judges has never seen a death penalty he likes and quickly votes to issue stays. Unfortunately, delays in appellate review of death convictions often involve not only legalities of a constitutional nature but also judicial personalities philosophically opposed to the death penalty.

The majority of time consumed in review of capital cases occurs in the federal courts. Statistics compiled by an American Bar Association Committee showed that in the states analyzed, 80 percent of the total time spent on collateral review in capital cases was spent in federal courts. This does not mean, however, that the reviews are frivolous. In fact the NAACP reported that between 1976 and 1983, out of forty-one decisions by the federal court of appeals in capital cases, the condemned person prevailed in thirty cases, or 73.2 percent. [It has been noted, however, that few federal reversals occur in capital cases originating in Kentucky due to the Kentucky Supreme Court's meticulous review process. *See*., Alan W. Clark, *Procedural Labyrinths and the Injustice of Death: A Critique of Death Penalty Habeas Corpus (Part Two*) 30 U. Rich. L. Rev. 303, n. 310 (1996)]. These cases in federal court had already been affirmed at least once and usually numerous times by the state's highest court, and denied certiorari at least once by the United States Supreme Court. This is evidence that, although the process is slow, it ensures that justice prevails, thus reducing the risk of error in capital cases where death is final.

Congress, in response to the public's outrage with the capital appellate process, enacted the Antiterrorism and Effective Death Penalty Act of 1996, as a primary attempt to partially eliminate the lengthy delay between sentencing and execution. The Act includes several changes that are likely to shorten the capital appellate process. A couple of particular changes the Act implements include a one-year statute of limitations for filing a habeas petition, as well as limitations on second or successive federal appeals, therefore, eliminating situations where death row inmates such as McQueen file several federal habeas petitions. (McQueen filed three). The goal is for justice to be served in an accelerated process.

As an examination of the process of reviewing death convictions reveals, in a large number of capital cases the delay between sentencing and execution is indispensable in order to ensure justice. The Ninth Circuit [in *McKenzie v. Day*, 57 F.3d 1461 (9th Cir. 1995)] rejected a death row inmate's third federal habeas petition claiming that the delay in carrying out his death sentence constituted cruel and unusual punishment. The Ninth Circuit held that the delay was caused because the condemned defendant took advantage of the procedures that "ensure that executions are carried out only in appropriate circumstances." *Id.* 1467. The Court further stated:

That this differs from the practice at common law, where executions could be carried out on the dawn following the pronouncement of sentence...a consequence of our evolving standards of decency which prompt us to provide death row inmates with ample opportunities to contest their convictions and sentences. Indeed, most of these procedural safeguards have been imposed by the Supreme Court in recognition of the fact that the common law practice of imposing swift and certain executions could result in arbitrariness and error in carrying out the death penalty. *Id.*

The value our society places upon life requires that capital cases be given meticulous review by tiers of appeals through the state and federal appellate courts. Rushing through this capital appellate process could be far more inhumane than these procedural safeguards. Due to the finality of death, some degree of delay is unavoidable in order to ensure true justice is served.

Justice J. William Graves
Supreme Court of Kentucky
Paducah, Kentucky.


Return to the Table of Contents

The Advocate, Vol. 20, No. 6 (November 1998)

Public Advocacy Seeks Nominations

An Awards Search Committee will recommend two recipients to the Public Advocate for each of the following 3 awards for the Public Advocate to make the final selection. Contact Tina Meadows at 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky 40601; Tel: (502) 564-8006, #236; Fax: (502) 564-7890 for a nomination form. E-mail: tmeadows@mail.pa.state.ky.us. All nominations are required to be submitted on this form by March 1, 1999. Members of the Awards Search Committee are: John Niland, DPA Contract Administrator, Elizabethtown; Dan Goyette, Director, Jefferson District Public Defender's Office, Louisville; Christy Wade, Legal Secretary, Hopkinsville Office, Hopkinsville; Tina Scott, Paralegal, Post-Conviction Unit, Frankfort; Ed Monahan, Deputy Public Advocate, Frankfort, Ky., Chair of the Awards Committee.

GIDEON AWARD:
TRUMPETING COUNSEL FOR KY.'S POOR

In celebration of the 30th Anniversary of *Gideon v. Wainwright*, 372 U.S. 335 (1963), DPA established the Gideon Award in 1993. The award is presented at the Annual DPA Public Defender Conference to the person who has demonstrated extraordinary commitment to equal justice and who has courageously advanced the right to counsel for the poor in Kentucky. Recipients have been:

1993 Vince Aprile, DPA General Counsel
1994 Daniel T. Goyette and the Jefferson District Public Defender's Office
1995 Larry H. Marshall, DPA Appeals Branch
1996 Jim Cox, DPA's Somerset Office Director
1997 Allison Connelly, U.K. Clinical Professor
1998 Ed Monahan, Deputy Public Advocate

***Rosa Parks* Award**
Advocacy for the Poor: Non-Attorney

Established in 1995, the Rosa Parks Award is presented at the Annual DPA Conference to the non-attorney who has galvanized other people into action through their dedication, service, sacrifice and commitment to the poor. After Rosa Parks was convicted of violating the Alabama bus segregation law, Martin Luther King said, "I want it to be known that we're going to work with grim and bold determination to gain justice... And we are not wrong.... If we are wrong justice is a lie. And we are determined...to work and fight until justice runs down like water and righteousness like a mighty stream." Recipients have been:

1995 Cris Brown, Paralegal, Capital Trial Unit
1996 Tina Meadows, Executive Secretary for Deputy Public Advocate
1997 Bill Curtis, Research Analyst,, Law Operations
1998 Father Patrick Delahanty

Nelson Mandela Lifetime Defense Counsel Achievement Award: System-wide Leadership

Established in 1997 to honor an attorney for a lifetime of dedicated services and outstanding achievements in providing, supporting, and leading in a systematic way the increase in the right to counsel for Kentucky indigent criminal defendants. The attorney should have at least two decades of efforts in this regard. The Award is presented at the Annual Public Defender Conference. Nelson Mandela was the recipient of the 1993 Nobel Peace Prize, President of the African National Congress and head of the Anti-Apartheid movement. His life is an epic of struggle, setback, renewal hope and triumph with a quarter century of it behind bars. His autobiography ended, "I have walked the long road to freedom. I have tried not to falter; I have made missteps along the way. But I have discovered the secret that after climbing a great hill, one only finds that there are many more hills to climb... I can rest only for a moment, for with freedom come responsibilities, and I dare not linger, for my long walk is not yet ended." Recipients have been:

1997 Robert W. Carran, Attorney at Law, Covington, Kentucky
1998 Col. Paul G. Tobin, Louisville, Kentucky

A new ***Professionalism & Excellence Award*** will begin at the 1999 Annual Conference. The President-Elect of the KBA will select the recipient from nominations and present the Award at the Annual DPA Conference. The criteria is the person who best emulates Professionalism & Excellence as defined by the 1998 Public Advocate's Workgroup on Professionalism & Excellence: *Professionalism and Excellence are achieved when every member of the organization is prepared and knowledgeable, respectful and trustworthy, and supportive and collaborative, in an environment that celebrates individual talents and skills, and which provides the time, the physical space and the human, technological and educational resources that insure high quality representation of clients, and where each member takes responsibility for their sphere of influence and exhibits the essential characteristics of professional excellence.* Nominations are due to Tina Meadows by March 1, 1999.

 Return to the Table of Contents

KY Department of Public Advocacy

Career Opportunities

Applicants will be required to complete and submit a standard state application form. Parties interested in Staff Attorney positions should submit a resume and writing sample to:

Tim Shull, Recruiter
Department Of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, Ky 40601
(502) 564-8006 (Phone)
(502) 564-7890 (Fax)
Tim.Shull@ky.gov

All DPA positions are filled according to Kentucky Personnel Cabinet policies. Please contact the DPA recruiter listed above for further position information and current hiring status.

As of November 13, 2003 positions are on a contract basis per the Governor's hiring freeze.

This page is updated around the 10th of each month

The Department of Public Advocacy is currently recruiting for the following positions:

Staff Attorney I -

Bell County

Boone County

Bullitt County

Maysville

Murray

Paintsville

Updated: September 1, 2004

The Advocate

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2003

January | March | May | July | September | November

2002

January | March | May | July | August | September | November

2001

January | March | May | July | September | November

2000

January | March | May | July | September | November

1999

January | March | May | July | September | November

1998

January | March | May | July | September | November

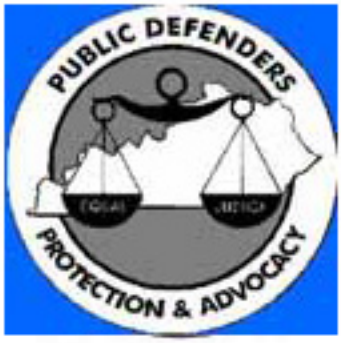
1997

July | September | November

Return to the DPA home page

Page Revised:
9-20-02

The Advo



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